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6

REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOLUME XLVII

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE FIRST DISTRICT
IN JANUARY, 1893; IN THE SECOND DISTRICT IN MAY AND
JUNE, 1893, AND IN THE FOURTH DISTRICT IN
MARCH AND JUNE, 1893.

REPORTED BY
EDWIN BURRITT SMITH
OF THE CHICAGO BAR

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APPELLATE COURTS OF ILLINOIS

DURING THE TIME OF THESE REPORTS.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1892.

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CHARLES HANEWACKER
V.
HARRIET FERMAN.

Dram Shops—Weight of Circumstantial as Against Direct Evidence—Province of Jury—Special Interrogatories—Evidence—Punitive Damages.

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152s	321
47	17
67	501

1. In an action under the Dram Shop Act, where the proof that plaintiff's husband had received liquor in defendant's saloon was purely circumstantial and was contradicted by positive evidence, *held*, that it was peculiarly the province of the jury to decide on which side the truth lay.
2. Immaterial evidence which was admitted against objection bearing on the question of damages, *held*, to have been so carefully guarded by instructions as not to constitute reversible error.
3. If defendant sold plaintiff's husband liquors surreptitiously, against repeated protests of plaintiff, after the husband had acquired the habit of drinking to excess, and under circumstances which advised him of the impoverished condition of the family, punitive damages might properly be awarded.
4. Where a party desires special findings, his questions must be so framed as to submit to the jury material and controlling facts.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Rock Island County;
the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. J. L. HAAS and W. H. GEST, for appellant.

Messrs. J. T. KENWORTHY and M. M. STURGEON, for appellee.

MR. JUSTICE HARKER. This was a suit brought by appellee under the Dram Shop Act, to recover damages for injury to her means of support, her person and her personal property, caused by the sale of intoxicating liquor to her husband by appellant. The declaration contains two counts. The first alleges that the defendant, a saloon keeper, sold and gave intoxicating liquor to her husband from time to time, causing his continuous intoxication for a period of two years. The second charges such sales and that they caused her husband to become an habitual drunkard. A verdict and judgment were rendered against the defendant for \$1,200. He has appealed and seeks a reversal, because, as alleged, the Circuit Court erred in admitting improper evidence, in giving and modifying instructions, in refusing to submit certain questions of fact for the special finding of the jury, and because the verdict is against the evidence and is excessive.

For several years prior to the commencement of this suit William Ferman, the husband of appellee, had lived with his wife and children in the little village of Hampton, following to some extent the occupations of barber, paper hanger, painter, tinner, clock tinker and common laborer. About fifteen years ago he began the use of intoxicating liquor. His use of it has gradually increased, and for three or four years he has neglected the support of his family. Although there is some conflict in the evidence, we are satisfied from it that for four or five years the family have been in a condition bordering on pauperism, and that such meager support as they have had, has been furnished by appellee's own hands, while her husband was spending his time in the saloon of appellant and other saloons in the village. That appellee has been injured in her means of support by reason of the intoxication of her husband, we

Hanewacker v. Ferman.

entertain no doubt. The only serious question in controversy is the connection of appellant with producing that intoxication. No witness testified to seeing appellant or any one in his saloon sell or give liquor to Ferman. The conclusion that he did obtain liquor there was evidently reached from the circumstances of Ferman spending much of his time in the saloon, his going in there sober and coming out drunk, and his being seen at appellant's bar with glasses in front of him. Appellant and his bartender denied on oath that Ferman had obtained liquor there, and they were corroborated by Ferman himself. It was a very serious matter for the jury to disbelieve this positive testimony, and find from the circumstances alone that Ferman had procured liquor there; but it was their peculiar province, in view of the inharmony between the positive evidence on one side, and the circumstantial evidence on the other, to decide where the truth was. We are not prepared to say that decision was wrong.

Much complaint is made by counsel of the latitude allowed by the court to the plaintiff in showing upon the trial the number of children in the family, how poorly they were provided for, the character of labor she was compelled to perform, what she earned and how she spent it all in support of the family. While some of this testimony could have been excluded as immaterial, we are unable to see how its admission was possible to affect the result except as to matter of damages; and in that respect it was most carefully guarded by instructions. No error was committed in giving instructions for the plaintiff or in modifying others offered by the defendant.

The defendant asked six questions of fact to be submitted to the jury for special finding. The court refused three of them and that is assigned as error. One asked the jury to find whether the plaintiff had within five years drank intoxicating liquor with her husband; one asked them to find whether she had within that time drank intoxicating liquor with her husband and one Joseph Hermer, and the other asked them to find whether she had within that time drank

intoxicating liquor with her husband and one S. L. Meader. Where a party desires special findings under one statute his questions should be so framed as to submit to the jury material and controlling facts. C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132. The questions refused did not submit material and controlling facts and were properly refused.

It is contended that the damages are excessive. When considered as actual damages this is perhaps true. But if the jury were warranted under the evidence in awarding actual damages, then we think the circumstances were sufficient to authorize the awarding of punitive damages also. Clearly the plaintiff was injured in her means of support by the intoxication of her husband, and we can not say the jury found incorrectly that the defendant aided in producing that intoxication. If he sold to the husband liquors, he did so surreptitiously, against the repeated protests of the plaintiff, after the husband had acquired the habit of drinking to excess, and under circumstances which advised him of the impoverished condition of the family.

We are of the opinion the judgment should be affirmed.

Judgment affirmed.

WILLIAM A. COULSON, ADMINISTRATOR, ETC,

V.

STATA B. HARTZ.

Limitations—Whether Promise to Pay Implied from Admission of Indebtedness—Ledger Entry as Admission.

Where a claim is presented by a widow against the estate of her deceased husband, and the defense avers that it was in part barred by the statute. *held*, that a ledger entry of a balance due the wife, made by the husband or by his direction, was, under the circumstances, such an admission that the amount there stated was due and unpaid, as would raise an implied promise to pay such amount and bar the statute.

[Opinion filed May 25, 1893.]

Coulson v. Hartz.

APPEAL from the Circuit Court of Peoria County; the Hon. N. E. WORTHINGTON, Judge, presiding.

Messrs. JUDSON STARR and McCULLOCH & McCULLOCH, for appellant.

That part of the account preceding the balance struck January 18, 1886, is barred by the statute of limitations. The claim as presented, with the exception of one item on the credit side and three or four counter-balancing items, was more than five years old at the time of the death of the intestate. It is now claimed that the entry of these items on his books of account draws after them all the preceding items so as to do away with the bar of the statute of limitations. In this we think they have entirely failed, for the following reasons:

First. The rule never did prevail except in cases where there were mutual dealings calling for debits and credits between the parties. We do not now allude to the exception of accounts between merchants mentioned in the older statutes of limitation. Such exceptions have nothing to do with the present controversy. The rule as contended for by the appellee never did apply to any case, except as before stated, to those in which there were mutual dealings requiring the keeping of mutual accounts between the parties. *Boyer v. Sweet*, 3 Scam. 120.

But that rule has never been adopted in this State. In the case of *Thompson v. Reed*, Adm'x, 48 Ill. 118, it is said by Mr. Justice Lawrence that the tendency of modern decisions has been greatly to restrict the application of the doctrine of mutual credits to the statute of limitations; citing 2 *Parsons on Contract*, 351, and cases cited in the notes.

In *Reeves v. Herr*, Ex., 59 Ill. 81, it was decided that where all the items of an unliquidated account are on one side, the last item which happens to be within the statute of limitations will not draw after it those of a longer standing. To the same effect is *Harris v. The Jackson County Ag'l Board*, 9 Ill. App. 272.

The principle upon which the rule contended for rested

was, that the giving of the credit of one or more items within a period of the statute of limitations amounted to evidence of an acknowledgment of there being an open account between the parties, and of a promise to pay the balance when the same should be ascertained. In *Catling v. Skoulding*, 6 T. R. 189, which is the leading case upon that subject, the rule was so stated by Lord Kenyon, who rendered the decision. In the note to 2 *Parsons on Contracts*, cited as aforesaid, with approval by our Supreme Court, it is said: "Perhaps this decision is consistent with the views then prevailing in respect to new promises and acknowledgments; but it is submitted that it can not be sustained upon principle, since the decision in *Tanner v. Smart*, in England (6 B. & C. 603), and *Bell v. Morrison* in this country (1 Pet. 351). And this is the view adopted by the Supreme Court of New Hampshire, in *Blair v. Drew*, 6 N. H. 235." The note then goes on to quote largely and with approval from the opinion of Mr. Justice Parker in the last cited case, which seems to us to be conclusive of this question.

Following out the principle upon which our Supreme Court rests the defense of the statute of limitations, namely, that it is a statute of repose, and not merely a statute which raises the presumption of payment from lapse of time, the rule has become firmly established in this State, that a mere admission of the existence of a debt will not take it out of the statute of limitations; but in order to have that effect, such admission must be of a sum certain to be due to the plaintiff, accompanied by the promise to him or his agent to pay the same, and that a promise made to a third party is not sufficient for that purpose. *Norton v. Colby*, 52 Ill. 198; *McGrew v. Forsyth*, 80 Ill. 596; *Teessen v. Camblin*, 1 Ill. App. 424; *Katz v. Moessinger*, 7 Ill. App. 536; *McClintick v. Layman*, 12 Ill. App. 356; *Bassett v. Noble*, 15 Ill. App. 360.

Where the book accounts of a defendant are introduced as evidence against himself, it is upon the principle that entries made therein are admissions made by him against his own interests. 1 *Greenleaf's Evidence*, Sec. 120.

But it is nowhere held that such entries made upon one's own books are evidence of the existence of any previous debt unless such entries have reference to such previous debt.

Messrs. HOPKINS & HAMMOND, for appellee.

It is urged by appellant that neither the statute, nor the common law, are so complied with as to authorize the introduction of these account books in evidence. But it will be observed that this case is not one to which the said statute and rules of the common law relate. They refer to cases in which a plaintiff seeks to make his own books evidence of a claim in his own favor, and prescribe the terms upon which he may do so. But, in this case, the plaintiff produces the defendant's books, with entries made by him upon them showing her claim admitted and stated by S. B. Hartz in his lifetime, in his own handwriting and by his authority. The admissibility of these books, to prove the issue, depends upon no statute but upon the general law of evidence. And by that, as we understand it, they are competent and very satisfactory admissions, and conclusive, unless the contrary is shown.

In 1 Phillips on Evidence, edition of 1868, p. 360 (marginal 439), the rule is thus stated :

“It is scarcely necessary to observe that where the party himself furnishes an account making against him, it is very satisfactory evidence of an admission. Such an account is an express admission if signed, and when not signed, yet, being proved to be in the defendant's handwriting, it is allowed to go to the jury against him. So any paper written by a party is evidence against him, though it be signed by a third party.” Authorities are cited supporting the text.

In 1 Phillips on Evidence, p. 307 (marginal p. 377, first clause), it is said : “But the books of deceased persons are considered as sworn to and come with the same force as books supported by the oath of living parties. And the course, where a party has died, is to prove his handwriting,” etc. Authorities are here also cited in support of the text.

It is further objected by appellant that the books, even if competent evidence and uncontradicted, do not prove enough to warrant a recovery.

The defense of the statute of limitations being interposed, appellant urges that even if the books are regarded as a full and unqualified admission of the indebtedness after the bar of the statute had run, still they do not contain a promise to pay the debt, and that such promise is a further necessity in order to take the claim out of the bar of the statute of limitations.

We do not understand the rule; but we understand the law to be that a clear admission of the debt, and that it is due and unpaid, made after limitation has run, unaccompanied by anything done or said at the time, in conflict with the admission, and from which an intention not to pay may be inferred, a promise to pay will be implied from such unqualified admission of the indebtedness.

The cases cited by appellant's brief to support the rule he contends for do not support it, but do support the rule we contend for.

In *Carroll v. Forsyth*, 69 Ill. 127, at p. 131, the court, by Mr. Justice Scholfield, say: "The law, as recognized by this court, is, that to remove the bar of the statute of limitations, it is incumbent on the plaintiff to prove * * * an unqualified admission that the debt is due and unpaid, nothing being said or done at the time rebutting the presumption of a promise to pay. It must be of such a character as to show clearly the recognition of the debt and an intention to pay it." Citing *Parsons v. Northern Illinois Coal & Iron Co.*, 38 Ill. 433; *Ayers v. Richards*, 12 Ill. 148; *Norton v. Colby*, 52 Ill. 199.

In the same case the court also quote and approve the rule, as stated by Judge Story in *Rall v. Morrison*, 1 Peters, 326, in this language: "If there be no express promise, but a promise to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to be certain and unqualified, and a direct admission of a previous subsisting debt which the party is liable and will-

ing to pay. If there be accompanying circumstances which repel the presumption of a purpose or intention to pay, or if the expressions be equivocal, vague or indeterminate, tending to no certain conclusion, but at best to probable inferences which affect different minds in different ways, we think they ought not to go to the jury as evidence of a new promise to renew the cause of action."

In *Wachter v. Albee*, 80 Ill. 47, the case of *Kneer v. Creede*, 19 Ill. 189, and *Ayers v. Richards*, 12 Ill. 147, are referred to and noted, and said case of *Carroll v. Forsyth* is alluded to by Mr. Justice Craig, speaking for the court, at p. 49, in this language: "And in the late case of *Carroll v. Forsyth*, 69 Ill. 127, it is held an express promise to pay must be proved, or an unqualified admission that the debt is due and unpaid, nothing being said or done at the time rebutting the presumption of a promise to pay."

The case of *Quayle v. Guild, Adm'r*, 91 Ill. 378, cited by appellant's brief, is not in conflict with the doctrine aforesaid. In that case, at p. 385, bottom, and 384, top, the court, by Mr. Justice Sheldon, say: "In order to take a case out of the statute of limitations there must be a promise to pay the debt. It is not sufficient that the debtor admit the account to be correct, but he must have gone further and admitted that the debt was still due and had never been paid."

MR. JUSTICE CARTWRIGHT. Mrs. Stata B. Hartz filed in the Probate Court two claims against the estate of her deceased husband, Samuel B. Hartz. The claims were consolidated and tried and \$3,300.73 was allowed. On appeal to the Circuit Court there was a trial by that court and \$3,157.74 was allowed, and the administrator appealed. The proof of the amount allowed consisted of entries made by Samuel B. Hartz, or by his direction, in books of account kept by him. Two ledgers, two journals and a cash book were produced from the custody of his administrator, as his books of account, and the entries were contained in them. The statute of limitations was interposed as a defense. The

first item of the account as shown by the ledger was under the date of October 12, 1878, and the account contained subsequent items on each side down to January 18, 1886, when it was balanced for the first time, and showed a balance in favor of Mrs. Hartz of \$4,917.94. This balance of \$4,917.94 was carried forward into the new account which was started with that balance and continued with items on each side, the last of which was on January 21, 1887. The account was finally balanced January 27, 1887, showing a balance due Mrs. Hartz of \$4,311.26. This balance was carried forward on the credit side of the ledger. The ledger account was entitled, "Mrs. Stata B. Hartz," and the final entry was as follows:

"1887. Jan'y 27. By balance.....\$4,311.26."

The first balancing of the account was more than five years before the death of Samuel B. Hartz, but the last balancing and entry of the balance due Mrs. Hartz as well as some of the later items of the account were within such five years. This account, in connection with the entries of credits to Mrs. Hartz in the other books from which the same were posted to the ledger, was the evidence relied upon to establish the claim and take it out of the statute of limitations. It is claimed by appellant that the evidence was insufficient for such purposes.

The nature and uses of a ledger are well known. It is a book used for the purpose of keeping a summary of all the accounts which the person keeping it has with each person in whose name a ledger account is kept. It is the final book of account to which all the items of account are carried from the journals or other books containing items belonging to the account. The items so carried to the ledger account are there entered in their appropriate places so as to show in one place in that book the condition of the whole account with the particular person named. In keeping with such uses and purposes the ledger in question contained charges and credits brought from other books, and is to be presumed to show the condition of the whole account. When the balance was struck it was intended to show the

amount due appellee, and we think that it was rightly regarded as an admission that the balance of \$4,311.26 was then due, owing and unpaid to her. An admission, wherever found, is admissible in evidence against the person making it. But it is insisted that in order to remove the bar of the statute of limitations an express promise to appellee to pay the amount was essential. It seems to be the rule that an express promise to pay is not necessary, but that an implied promise is a sufficient new promise to remove the bar of the statute. If the entry would be sufficient to establish the claim as an original transaction, no reason occurs to us why it would not be sufficient as a new promise. It is held that a promise will be implied from an unqualified admission that the debt is due and unpaid, accompanied by nothing said or done to rebut the presumption of a promise to pay it. In *Ditch v. Vollhardt*, 82 Ill. 134, an implied promise arising from a recognition of the debt and an express promise to pay part of it on a day named, was held sufficient, without any express promise to pay the balance. In *Schmidt v. Pfau*, 114 Ill. 494, it was held that the statement by Schmidt, "This matter of salary has not been settled yet—we owe you for three years' salary," clearly took the claim out of the statute, although the amount of the salary was in controversy. The balance in the ledger was an admission by which Samuel B. Hartz acknowledged without condition or qualification that the amount there entered was due to appellee and unpaid. From such admission it seems that a promise to pay may be fairly implied. The parties were husband and wife living together, and so far as appears he kept the only account between them. The ledger account was for their examination and inspection, to inform themselves of the condition of the account or for the purpose of settlement, but not for delivery to her. The account being entitled in her name we think was an admission to her, but not of a nature to be delivered to her to take effect. While it may be regarded the same as a writing addressed to her, it is not the same as a writing intended for delivery, but which has never been delivered. We think that

she will be presumed to have accepted and acted upon the admission and the promise implied therefrom.

Appellant proved that Mr. Hartz built an addition to the house in which he and appellee lived with his family, the title to which was in appellee, and that he expended \$2,000 in building the same. There was no evidence that the money so spent was ever charged to appellee or that it was ever intended to charge her with it. There was no presumption that she was to repay it under those circumstances, and the court was right in refusing to allow it as a set-off. The judgment will be affirmed.

Judgment affirmed.

MR. JUSTICE HARKER, dissenting. I am unable to concur with the majority of the court. I think that part of the account preceding the balance struck January 18, 1886, was barred by the statute of limitations. I do not think that the balance entry of January 27, 1887, appearing upon the ledger of deceased, was sufficient to remove the bar of the statute. My associates are of the opinion that if the entry was sufficient to establish the claim as an original transaction, it would be sufficient as a new promise. It is upon this point that I disagree with them. I am unable to regard the entry as more than a bare admission, unaccompanied by any promise to pay. I do not understand that a mere acknowledgment of the correctness of an account, unaccompanied by a promise to pay, is sufficient to take it out of the operation of the statute. While I do not regard proof of an express promise as necessary, yet, as I read the decision of our Supreme Court, the rule is, that in order to take an account, already barred, out of the operation of the statute, nothing short of an express promise or circumstance showing an unqualified intention to pay will suffice. It is necessary, too, that the promise be made to the person to whom the barred debt was due or to some one authorized to act in his behalf. *Ayers v. Richards*, 12 Ill. 147; *Keener v. Crull*, 19 Ill. 189; *Carroll v. Forsyth*, 69 Ill. 127; *Norton v. Colby*, 52 Ill. 198; *Wachter v. Albee*, 80 Ill. 47; *McGrew v. Forsyth*, 80 Ill. 596.

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It does not appear from the evidence that the fact of the entry was communicated to the claimant, nor that she knew anything about it until after the death of her husband. To my mind there were no such circumstances accompanying the entry as to warrant the inference of a promise to pay the debt.

STEPHEN MARSCHALL
V.
ANNA BELLE LAUGHRAN.

Dram Shops—Proximate Cause of Death—Evidence—Instructions—Scope of Cross-examination—Measure of Damages.

1. In an action under the Dram Shop Act brought by a widow to recover damages for the death of her husband, *held*, that the evidence justified the finding that the proximate cause of death was a fall by deceased while intoxicated.

2. Where deceased after the fall, vomited, any one with a sense of smell was competent to testify as to the presence of spirituous liquor in the contents of the stomach.

3. Upon cross-examination of a witness to develop the fact of his interest in the suit, it was the interest of the witness as he then understood it that was proper to be considered by the jury, and the fact that he was mistaken, as was subsequently discovered, as to such interest, did not affect the propriety of the cross-examination.

4. Upon the case presented, *held*, that the damages were not excessive, the jury having been properly instructed.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Rock Island County;
the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. JOSEPH L. HAAS, for appellant.

Messrs. McENIRY & McENIRY, for appellee.

MR. JUSTICE CARTWRIGHT. Appellee brought this suit against appellant, a saloon keeper, to recover damages under the Dram Shop Act for injury to her means of support, resulting from the death of her husband, and obtained a verdict for \$2,000, on which the court, after overruling a motion for a new trial, entered judgment.

The facts appearing on the trial were substantially as follows: The deceased was about twenty-eight years old when he died. He was an able-bodied man, of good general health, of good education and of sober and steady habits. He had learned the trade of a machinist and worked at it a short time, after which he enlisted in the regular army of the United States and served five years. He was married to appellee June 12, 1890, while serving in the army and stationed in Montana. As a soldier he received \$13 a month and rations and clothing. He was discharged from the army March 5, 1891, after which he and his wife visited their relatives, and afterward came to Rock Island, October 16, 1891, in hopes of finding work at his trade or some other suitable occupation. He had not found or done any work since his discharge. During the evening of December 2, 1891, he came to appellant's saloon perfectly sober and remained there until near midnight. While there appellant sold to him several drinks of lager beer and hot New England rum. The bill against him for liquor and cigars sold to him on that occasion was \$2.20, a part of which liquor and cigars were used in treating others, some of whom, at least, treated him to drinks in return. When he left the saloon, he started with a companion for his home which was in the second story of a building, and in going up the outside stairway, he fell from a landing over the railing headlong to the frozen ground below, a distance of from thirteen to sixteen feet. He was taken up unconscious and lived five days, during which time he was sometimes rational and sometimes delirious, and at the end of that time he died—on the Monday evening following the fall. He had professional medical attendants, who pronounced the injury concussion of the brain or a clot of blood on the brain. The evidence established the sales

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of intoxicating liquors by appellant to the deceased, and the fact that several such sales were of hot New England rum, and fully justified the jury in finding that such liquor caused intoxication of the deceased and his consequent fall and death. It is urged, however, that the fall was not the cause of his death. This claim is founded on the fact that during his illness and delirium, his wife frequently moistened his lips with whisky and water by putting her fingers in the liquid and touching his lips, and two days before he died she gave him part of a glass of beer. It is argued for appellant that this was the cause of his death; that by moistening his lips with liquor and water, the liquor was inhaled as it evaporated, and thereby she distilled the poison laden fumes of alcohol into his system, and put all the endeavors of science and medical lore at defiance, and when such conduct was followed by giving part of a glass of beer it proved fatal. The evidence does not justify that conclusion. It would seem more rational to refer the death to the fall than to the fumes of whisky mingled with water, and the medical testimony leads to the belief that the fall was the proximate cause of death.

Appellee testified, under objection, that deceased, when taken up stairs after the fall, vomited blood and whisky, and that one could smell whisky all over the house. It is objected that the presence of whisky in the contents of the stomach could only be proven by expert testimony, or by chemical analysis, and that the uncertainty of other evidence is illustrated in this case by the fact that it was rum instead of whisky. It might require a chemist in such a case to decide whether liquor was distilled from molasses or corn, but any person with the sense of smell is competent to discover and testify to the presence of spirituous liquor on such an occasion, and there was no attempt to distinguish different sorts of liquor by the witness. The only material inquiry was whether there was spirituous liquor present, and if there was anything in the point that she misnamed the kind, appellant had the full benefit of that fact. It is objected that the court permitted a cross-examination of appellant's witness,

John Ohlweiler, president of the Liquor Dealers' Association, as to the interest of his association in the result of the suit. The cross-examination was proper to show his relation to the suit and his interest in the result as affecting his credibility. On such cross-examination he testified that it was his duty by virtue of his office, to investigate suits brought against members and in proper cases defend them; that his association was contributing to the defense of this suit and that in case judgment was recovered the association was to pay the whole judgment and costs. Afterward, on the motion for a new trial, he made an affidavit that the association only aided the defense and appropriated limited sums of money for such purposes, as he had subsequently discovered, but that did not affect the right of cross-examination which had been exercised. His relation to the suit as he understood it at the time he testified was proper for the consideration of the jury.

The court refused appellant's fourth and sixth instructions, and this is complained of. The fourth pointed out a witness by name and applied a rule of law to him, and was rightly refused. *Phenix Ins. Co. v. La Pointe*, 118 Ill. 384. The sixth required of appellant a higher degree of proof than the law demanded and was erroneous.

Appellee was allowed to prove the current rates of wages of common laborers and of machinists, and this is objected to. The amount of injury to the means of support of appellee depended upon the ability of her husband to earn money. After his discharge he had not been at work, but had gone from place to place in search of work. As he had not found work it was not possible to prove what he would probably have earned if he had lived by what he had earned. What he would have been worth to his wife as a means of support was, as it often is, not capable of exact determination, but the jury were called upon to decide that question and should have the best information attainable as to his ability to earn money for her support. In *Flynn v. Fogerty*, 106 Ill. 263, it was held "highly proper to show what the deceased himself had done in his lifetime,

Powell v. Bergner.

his habits of industry and thrift, income, and all that sort of thing, with a view of determining what he probably would have done in the future had he not been killed." These things were all fully shown to the jury in this case. It was shown that he had once acquired the capacity to earn money in the trade of a machinist, that he had afterward been in the army and that he had not since worked at any occupation. The jury were instructed that they should consider what the deceased himself had done in his lifetime, the character of his business or occupation and the income derived therefrom, his habits of industry and thrift, his age and physical condition, with a view of determining what he would have done in the future had he lived, but that they had no right to indulge in speculations or conjectures not supported by the evidence. The correct rule of damages was given to the jury. We think that in view of his education, age, habits, health and physical condition, and regarding him as without a trade or ability to earn money on account of having a trade, the damages awarded were fully justified. The judgment will be affirmed.

Judgment affirmed.

DAVID E. POWELL
v.
PETER A. BERGNER ET AL.

Landlord and Tenant—Recovery of Rent—Statute of Frauds.

In an action brought to recover for rent alleged to be due, fixtures removed, money paid in repairing damages done to the building in question, and the price of an iron grating, this court holds, in view of the evidence, that the judgment for the plaintiff was too small in a sum named, and reverses the same.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. McCULLOCH & McCULLOCH, for appellant.

Mr. JUDSON STARR, for appellees.

MR. JUSTICE HARKER. This was an action of assumpsit by appellant to recover for the rent of a store house, fixtures removed, money paid in repairing damages done to the building by appellees, and the price of an iron grating. To the declaration, which contained the common counts only, the general issue alone was pleaded.

There was a trial without a jury and a judgment rendered by the court in favor of the plaintiff for \$75, rent for one-half month. He is dissatisfied with the judgment and brings the case to this court for reversal, claiming there is due and unpaid him, for rent \$598.33, for a bull's-eye grating put in at the request of appellees for their use \$115, for money paid out in repairing damages done the building by appellees, and for fixtures removed by them when they vacated the store-room.

The premises rented were a store-room and a basement in the city of Peoria. They were occupied by appellees from May 15, 1890, to August 1, 1891, but the court held they were liable to pay rent until the 15th of August, 1891. Appellant testified that the rental value was \$1,900 per year, but that he agreed to rent the premises for a period of five years from the 15th of May, 1890, at a rental of \$1,560 for the first year and \$1,800 for each subsequent year; that a written lease was to be executed, but for some reason never was, and that appellees vacated the premises without his consent.

Appellees denied that there was an agreement to lease for five years. One of them, P. A. Bergner, between whom and appellant the negotiations for renting were carried on, testified that they were to have the premises at the rate of \$130 per month for the first year, and \$150 per month afterward, but that no number of years was agreed upon.

The court correctly held them to be tenants by the month and chargeable with rent until the 15th of August, 1891. The evidence shows that all rent up to the 1st of August, 1891, the time when the premises were vacated, was paid.

Appellant concedes that the contract of leasing for five years, as testified to by him, was void under the statute of frauds, for the reason that it was not reduced to writing, but contends that appellees, having invoked the aid of the statute in their defense, became liable to pay rent according to the rental value of the premises for the whole period of time they were occupied by them, *i. e.*, at the rate of \$1,900 per year. We are unable to see the force of this contention, or the application of the authorities cited in support of it. Appellees did not plead the statute of frauds, nor in any manner invoke its aid as a defense. They denied that there was an agreement to rent for any number of years. Their position was that the letting was by the month, at a rental of \$130 per month for the first year and \$150 per month for such further time as they might occupy the premises. They do not say there was no contract because the agreement fell within the statute of frauds. They aver there was a contract and that they have lived up to it. The statute of frauds is not involved, and only appears in the controversy as the "man of straw" erected by appellant himself.

Upon leaving the premises, appellees removed certain trade fixtures which they had erected for their convenience in carrying on their business. These, appellant claims, were permanently attached to the building and insists that he should have damages for their removal. They were not permanent fixtures; they were the property of appellees and they had the right to remove them.

The evidence fails to show that appellant was entitled to recover money paid out in repairing the building after being vacated by appellees. No damage above ordinary wear and tear was done the building by appellees.

Upon the claim for the bull's eye grating, appellant testified that appellees agreed to pay for it and that it cost \$115. Appellees denied that they agreed to pay the entire cost of

it, but admitted that they agreed to pay \$50, or one-half its cost. Clearly, under the evidence, appellees were chargeable with \$50 on this claim, and the Circuit Court erred in not including it in his finding and judgment.

The judgment below will therefore be reversed and judgment rendered in this court in favor of appellant and against appellees for \$125 and all costs of suit.

Judgment reversed.

CHARTER GAS ENGINE COMPANY

V.

JOHN CHARTER.

Patents—Corporation—Meetings—Legality of—Evidence—Instructions.

1. A licensee can not raise the question of the validity of a patent as between the patentee and the United States, where such license has not been molested; because in such case the licensee has got all he bargained for.

2. While a stockholder represents no interest but his own, a director occupies a trust relation toward all the stockholders. That relation demands that he should act in the interest of those whom he represents. He is bound to manage the business intrusted to him in the interest of the stockholders alone, and may not administer the affairs of the corporation for his private emolument.

3. Without the consent of the stockholders of a corporation, a director can not become a contractor therewith, or have any personal or pecuniary interest in a contract between it and a third person, and such contracts, if made, are voidable at the instance of the corporation or of stockholders.

4. Such director may loan money to his corporation and take securities, and obtain debts due him therefrom. A corporation may also avail itself of the property of such director or officer under circumstances implying a contract to pay a reasonable compensation therefor. If money has been advanced or property furnished in good faith by such person, the corporation is liable to him on an implied assumpsit.

5. Plaintiff having claimed to be a director and acted as such, is to be treated as such so far as his claim against the defendant is concerned.

6. An instruction setting forth that if a certain quantity of stock was voted at a meeting, for persons named, they were elected as officers of

Charter Gas Engine Co. v. Charter.

the corporation in question, and ignoring the question whether any notice was given which would authorize the meeting at all, was bad.

7. As it is a question of law what will make a valid contract, so it is a question of law what will make it valid as a ratification, if proven, and an instruction authorizing the jury to determine the question of ratification should not be given.

8. Ratification or acquiescence which will prevent resistance to a voidable contract must be established by the conduct of given parties. The right to repudiate must be lost by affirmative act, or by unreasonable delay after opportunity to act with freedom and with full knowledge of all material facts.

9. The second special plea in the case presented, alleging that the contract was made upon the condition therein stated that plaintiff should and would protect defendant in its monopoly under the patent, but that the patent had been continuously infringed, whereby defendant was injured, and that the plaintiff, though notified, took no steps to interfere or protect defendant, *held*, that said plea was bad in not setting up any defense to the promise to pay a sum named for past use of the patent, and also because under its averments all that could be claimed by defendant would be the damage suffered, and no damages were alleged.

10. Publication of notice in a newspaper of proposed meeting is not equivalent to personal notice or notice by mail. A meeting can be held after improper notice only when all stockholders are present and consenting in person or by proxy.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding.

Mr. JOHN G. MANAHAN, for appellant.

The term "*de facto* officer" implies, from its terminology, that the person referred to is not a real officer, but only pretending to be such. His want of right to the office is conceded, and the only inquiry in reference to him is, as to what persons are bound to take notice of his want of title. A *de facto* officer is really and *per se* no officer at all. But, to protect those who may be fairly presumed to be ignorant of his want of title, the rule obtains that third parties, and the public, may rely upon the simple fact that he is acting in such official capacity. *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516.

In *Waterman v. C. & J. R. R. Co.*, 34 Ill. App. 268, Waterman sued the company for services rendered while presi-

dent *de facto*, and it was held that he was bound by his own knowledge of the infirmity of his title, *i. e.*, the incapacity of a mere *de facto* board of directors, of which he was one, to hire him. This case has since been affirmed by the Supreme Court. 139 Ill. 658.

“The acts of a *de facto* officer are not valid when they are for the benefit of the officer, a person not being permitted to take advantage of his own wrong.” Wait’s Actions and Defenses, Vol. 5, p. 9, and cases cited.

“The doctrine, as to an officer *de facto*, is only operative to protect persons who have trusted to his apparent right to perform the duties of the office.” People v. Albany R. R. Co., 55 Barb. 344.

“An officer *de facto* exists merely by sufferance, and can not assert any affirmative claim of any sort.” Christian v. Gibbs, 53 Miss. 314.

“In order to protect third persons, transacting business with such officers under such circumstances as to induce in them the belief that they are dealing with legal officers, the law reaches out upon the principle that although they be not officers *de jure*, they are officers *de facto*, whose acts public policy requires shall be considered valid.” “This principle, however, is not to be, and will not be extended to a case where the rights of public or third persons are not affected, nor where all the parties in interest have knowledge that the person pretending to be an officer is not such in law, for in such case the reason of the law no longer exists.” 6 Am. Corporation Cases, 148, and note.

“The acts of a *de facto* officer are valid only so far as the rights of the public and of third persons having an interest in such case, are involved; but such officer can claim nothing for himself.” The People ex rel. v. Weber, 86 Ill. 283; cited and approved in 89 Ill. 348.

Charter, therefore, being not a third party, and having a full knowledge of the infirmity of his own title, can base no claim on the proposition that the aforesaid board of directors were *de facto* officers, and it can add no force to his position to state that he is suing as a private person.

So was Waterman in the case cited in the 34th Appellate. The inquiry is rather as to the identity of the person; *i. e.*, whether he is a third person or not; and, having actual knowledge of the want of legality of said board, including himself, is not within the rule which is solely for the protection of those ignorant of the want of title of *de facto* officers.

The doctrine that an agent can not put himself, in reference to the property of his principal, in a position adverse to the latter, is illustrated by the following cases: Wickliff v. Robinson, 18 Ill. 145; Hughes v. Washington, 72 Ill. 84; Cottom v. Holliday, 59 Ill. 176; Ely v. Hanford, 65 Ill. 267.

In this case, the fact of Charter acting as a director of the company is shown by the testimony under the general issue and the first special plea, and the question here presented is, whether the corporation, having repudiated the contract, and declining to be bound by it, and having paid nothing thereunder, can be held thereby. No reputable authority can be found to sustain the right of a director to make such continuing executory contract as the one in suit, with his own corporation. Some of the authorities hold such an attempt to be void *ab initio*; others that it is voidable at the instance of the corporation; *i. e.*, that the corporation may repudiate it, as an infant would his, and as has been done in this case.

“A director of a corporate company can not become a contractor with the company, nor can he have any personal or pecuniary interest in a contract between a company of which he is a director, and a third person.” Michoud v. Gerod, 36 Ind. 60; 4 Howard (U. S.) 503; Coal and Iron Co. v. Sherman, 30 Barb. 553; Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Maryland, 456.

“Directors are both agents and trustees, and can not contract with themselves.” Ward v. Davison, 36 Am. Rep. 40; 1 S. W. 486.

“Contracts between directors of a corporation and the corporation are voidable, either by the company or its

stockholders." Beach on Corporations, 242-243, and cases cited.

"Persons who become officers and directors of a corporation place themselves in position of trustees, and the relation of trustees and *cestui que trust* is thereby created between them and the stockholders." Butts v. Wood, 37 N. Y. 317; Spofford v. Texas Land Co., 50 How. (N. Y.) 522; Bliss v. Mattison, 45 N. Y. 22; York Railway Co. v. Hudson, 19 Eng. Law and Eq. 365; Yoehler v. Black River Co., 2 Black. (U. S.) 715.

"Holding a fiduciary relation, they can not be permitted to acquire interests adverse to such relation." European Railway Co. v. Poor, 59 Me. 277; Jackson v. Ludeling, 21 Wall. 616.

It has accordingly been held that a director of an incorporated company can not become a contractor with the company, nor can he have any personal or pecuniary interest in a contract between the company of which he is a director and a third person. Port v. Russel, 1 Am. Rep. 5, 12, note.

"Directors can not be interested, directly or indirectly, in contracts made with the corporation. Such contracts are voidable at the instance of the company, or of stockholders." Polar Star Lodge v. Polar Star Lodge, 16 La. An.; Paine v. L. E. & L. R. R. Co., 31 Ind. 283; San Diego v. San Diego, etc., Co., 44 Cal. 106; Flint, etc., Railway Co., v. Dewey, 14 Mich. 477; St. James Church v. Church of the Redeemer, 45 Barb. 256.

In the case of the Aberdeen Railway Co. v. Blakie, 1 Macy App. Cases, 461, the House of Lords, reversing the judgment of the court below, held that a contract that was entered into by a manufacturer for a supply of iron furnishings to a railway company, of which he was a director at the date of the contract, was invalid and not enforceable against the company. Cited in 36 Ind. 60.

In Merrick v. Peoria Coal Co., 61 Ill. 479, and in Hartz v. Brown, et al., 77 Ill. 226, our Supreme Court has sustained the right of a director to loan money to his corporation;

but in *Beach v. Miller*, 130 Ill. 170, the language of those cases was largely modified, and the court declined to be bound by a statement therein, that a director might trade with his company on the same terms and in like manner as other persons.

In the latter case the only question was whether a director, as such, could contract with himself, where the corporation became insolvent, and it was held that he could not, as the property of the corporation then became a trust fund for the creditors. But the court declares that the directors are trustees for the shareholders during the solvency of the corporation, and quotes approvingly from *Ogden v. Murray*, 39 N. Y. 202, as follows: "Trustees, and persons standing in similar fiduciary relations, shall not be permitted to exercise their powers, and manage or appropriate the property of which they have control for their own profit or emolument, or, as it has been expressed, shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of the *cestui que trust*."

What is really decided in the *Beach* case is that the directors may not deal with the company in their own interest after the same becomes insolvent.

In *Roseboom v. Whittaker*, 132 Ill. 87, is a like decision upon the same question. In neither of these cases is there a contract between the director and his corporation sustained. It is a little difficult to understand why the fact that the directors are trustees for the stockholders during the solvency of the corporation should not as much disqualify them from acting with the board in their own interest, as does their trusteeship for the creditors, when the corporation has become insolvent; nor why their position as trustees in the first instance should not disqualify them to as great extent as their trusteeship in the last instance. In *Chicago Cab Co. v. Yerkes*, 141 Ill. 320, our Supreme Court holds a director disqualified to buy the corporate property.

The contract in question here, which involves a transfer of a large proportion of the earnings of the company for a series of years to one of its directors, presents a very serious

question. Here the appellee had control of the board, and the minority had to do the best they could. But even under this alleged contract he is to receive thousands of dollars each year, whether the stockholders have anything or not, and, if these pleas are true, the stockholders receive no benefit from him, and no return for these sums of money.

In *Wardell v. U. P. R. R. Co.*, 13 Otto, 651, the Supreme Court says: "The law, therefore, will always condemn the transactions of a party on his own behalf, when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They can not, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits." Citing several cases.

"Every member has a right to be present at all meetings of the corporate body, and must, in some manner, be notified to attend the same. And the omission to give the required notice, though accidental, will generally invalidate the proceedings at the meeting. Even the absence of a member from home will not excuse the want of notice." *State v. Ferguson*, 31 N. J. L. 107; *People v. Bachelor*, 22 N. Y. 128; *Smyth v. Darley*, 2 H. L. Cas. 789; *Rex v. Langhorn*, 4 Ad. & E. 538; *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534; *People v. Albany, etc., R. R. Co.*, 55 Barb. 344; *Jackson v. Hampden*, 20 Maine, 37; *Angell & Ames on Cor.*, Sec. 492, and cases cited.

"Where the charter of a joint-stock corporation prescribes the mode of giving notice of the time and place of holding meetings of stockholders, that mode must be pursued, or the notice will be ineffectual." *Shelby R. R. Co. v. Louisville, etc., R. R. Co.*, 12 Bush. 62; see also *Hardin v. Van DeWater*, 40 Cal. 77; *Stevens v. Eden Meeting-house*, 12 Vt. 688.

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Mr. C. C. JOHNSON, for appellee.

Article 4 of By-Laws provides: "A majority of the board of directors and a two-thirds majority of stockholders shall constitute a quorum for doing business at any meeting." So that not only was this annual meeting held upon the notice provided by the by-laws, but there was more than a quorum present.

There is no doubt of the proposition that a majority of the stockholders, at a regular meeting called, may make any combination or agreement not contrary to law, to elect a majority of the directors or obtain control of the corporation.

The Supreme Court in the case of *Fields v. Yates*, 57 Ill. 416 says: "Three persons owning a majority of the stock, had the unquestioned right to combine, and thus secure the board of directors and the management of the property. Corporations are governed by the republican principle that the whole are bound by the vote of the majority when the acts conform to the law of their creation."

John Carter, in his testimony, says: "To the best of my recollection, there were 798 votes at the stockholders' meeting in January, 1891; 456 votes as to three of the directors who had the highest number of votes, and 572 as to the three and including the fourth one. If the persons voting had one vote for each share of stock they represented, there would still be a majority for these four directors. That is, each of the four directors would have been elected if a single vote had been cast for each share of stock."

Mr. Robinson corroborates this statement. In fact, it is conceded that if the persons voting on the cumulative plan had instead voted one vote for each share of stock, the persons for whom they voted would have still received the highest number and have been elected.

Under no circumstances could the stockholders present be deprived of one vote for each share of stock, and, in any event, the vote polled should have been so counted. And in this case it made no difference whether a majority of stockholders voted on the cumulative plan or otherwise; the

result would inevitably have been the same, as it was clear, from the vote cast, the majority of the stockholders intended voting for the directors elected.

It is difficult, then, to see either the importance of the plea or proof of the election of the directors by the cumulative method of voting.

The votes cast by the majority of the stockholders, even if upon the cumulative plan, was understood by the meeting to result, whichever way counted, in the election of the four directors receiving the highest number of votes, for that the same was spread upon the records of the meeting without objection, and the directors so elected were allowed to act through the whole year; and at the next annual election, January 19, 1892, "the records of the last meeting were adopted."

But if it should appear there was irregularity in the election of such directors, yet, nevertheless, they would be directors *de facto*.

Not only was the election recorded in the records of the company, and acquiesced in at the time by the stockholders, but that such directors were permitted to act during the whole year as the only directors of the company. On the same day of their election they met and elected George M. Robinson president, and John G. Manahan secretary, who afterward conducted the business of the company, for that year, as the only acting president and secretary. They met on June 29, 1891, and appointed a committee to confer with appellee. They again met on July 8, 1891, and accepted the proposition of appellee, and directed the making the contract sued on. The proceedings were recorded in the books of the company as the proceedings of the company's board of directors. Their agent, Robinson, president of the company, entered in the books of the company the \$4,000 agreed upon in settlement of past royalties, and also \$818.16 royalties due under the new contract, for the first three months, to October 1st, according to the terms of the contract. They continued manufacturing the engines of appellee's invention and appropriated the full proceeds. At

the annual meeting of the stockholders, in the following year, the record of the election of the directors was approved.

The evidence abundantly shows that the irregularities in the election of the directors, if any there were, were waived by the company, and their election ratified. And the jury might well come to the conclusion, under the pleading and instruction of the court, that the company ratified the election of such directors.

The court will bear in mind that in the month of January, 1891, the directors were elected, and the contract, as set out in the declaration, is dated July the 9th, 1891. For six months, then, and for the full term of office, as a matter of fact, these directors, although now claimed to be irregularly elected, were allowed to act, not only in the making of the contract, but all the business of the company; every transaction, except that delegated to other agents, they were allowed to do and perform. Can it be said now, after they were allowed to serve out their term of office, and new directors elected, that these directors were not *de facto* directors in the making of this contract, and by whose acts it is bound?

“A *de facto* officer,” said Lord Ellenborough in *The King v. The Corporation of Bedford Level*, 6 East R. 368, “is one who has the reputation of being the officer he assumes to be, and yet he is not a good officer in point of law.” Angell & Ames, Sec. 287, 6th Ed.

In the case of *Baird v. The Bank of Washington*, 11 Serg. & Rawle (Penn.) 411, the bank was governed by a board of thirteen directors; nothing less than a majority of the whole constituted a quorum; a director was elected at a meeting at which five only of the directors were present; it was held “that, having a color of election, he was a director *de facto*, and that, as an agent of the corporation, his acts were valid, at least between the bank and third persons.”

“A person, by color of election, may be an officer *de facto*, though indisputably ineligible.” Angell & Ames on Corp., Sec. 287; again in Angell & Ames, Sec. 137.

“An irregular election, as in case of the election of an unqualified person, is voidable only, and not actually void; and hence the acts of trustees of a religious corporation, irregularly elected, yet in *color officii*, will be valid until such trustees are ousted by judgment at the suit of the people.” Trustees of Vernon Soc’y v. Hill, 6 Con. (N. Y.) 23; and again in same work on corporations, Sec. 286.

“Though the charter or act of incorporation prescribes the method in which the officers of a corporation aggregate shall be elected, and an election contrary to it would unquestionably be voidable, yet, if the officer has come in under the color of right, and not in open contempt of all right whatever, he is an officer *de facto*, within his sphere—an agent of the corporation—and his acts and contracts will be binding upon it.” (Citing a large number of authorities.)

In the Bank of the United States v. Dandridge, 12 Wheaton U. S. R., 79, Justice Story says: “Persons acting publicly as officers of the corporation are to be presumed rightfully in office. If officers of a corporation openly exercise a power which pre-supposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed.”

In Lovett v. The German Reformed Church, 12 Barbour, 67, the court says: “Corporations that have permitted particular individuals to take possession of their property, their seal and their records, to act as their trustees, and have, in fact, held them out to the world as their trustees, and as authorized to act for them, are, as much as an individual would be, estopped from questioning the acts of their agents, within the scope of their apparent authority.”

In the case of The Dispatch Line of Packets v. Bellamy Manufacturing Co., 12 N. H. 205, a law of a corporation provided that any person chosen a director should cease to be one when he ceased to be a proprietor; held that this, by implication, rendered any one not a proprietor ineligible to the office.

If a corporation elect a person a director who is ineligible to that office, and permit him to act as such, the corporation will be barred by the acts which he performs within the scope of the authority possessed by a director. "By electing him a director, and permitting him to act as such, the corporation held him out to the world as a director, as one of their agents, having all the power of an agent of that description, and to be trusted as such. The corporation, when Emery was elected, had the means of knowing whether he was qualified according to their by-laws; they left his election on the records and permitted him to act, etc. It is a settled rule that a person is bound by the acts of another whom he has held out to the world as his agent for that purpose." *Davis v. Lane*, 10 N. H. 156; *Beard v. Kirk*, 11 N. H. 397.

We therefore submit that the appellee had an unquestioned right, even although a member of the board, to enter into the contract with them. That the whole board were the *de facto* officers of the company, which only is necessary to make the contract of any person dealing with them valid.

That election of directors, although irregular, is not void, only voidable.

In Morawetz on Private Corporations, 100, the author lays down the rule: "If a contract entered into by a corporation has been performed by either of the parties, the other party can not set up as a defense to an action for the breach of such contract, that the corporation had no authority to enter into it." Again, on page 101: "It has sometimes been said that after a corporation has received the benefit of a contract made in excess of its chartered powers, it will be estopped from denying that it had authority to make the contract." *Bradley v. Ballard*, 55 Ill. 413; *Chicago B'ld'g Soc'y v. Cromwell*, 65 Ill. 454; *Racine R. R. Co. v. Farmers' S. & T. Co.*, 49 Ill. 346; *Newberg Petroleum Co. v. Weare*, 27 Ohio State, 343; *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69.

In the case of *Batelle v. Northwestern Cement & Concrete Pavement Company*, 33 N. W. Reporter, (Minn.) 327, where an agreement for the conveyance of property to the

company was made before the company was organized, and the property conveyed and used by the company, the court say: "After receiving the benefit of the previous engagement, and accepting and using the property in its business, knowing that, as a part of the price of the property, the corporation was to pay the indebtedness, it can hardly be permitted now to deny its liability to pay it."

In *Chicago Building Soc'y v. Cromwell*, 65 Ill. 453, the court says: "When corporations have exercised power incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any expressed right conferred, they will be estopped from denying that they had authority to make such contracts. * * * The rule has its foundation in the plainest principles of justice."

"When such corporations have received the benefit of a contract, if there is nothing in it that is contrary to public policy, there can be no just reason why they should not be required to perform it."

In the case of *Bradley v. Ballard*, 55 Ill. 413, a case where a corporation, organized under the laws of this State, borrowed money to do business outside of the State, the court say :

"The corporation has received the money and used it for a purpose which, whether *ultra vires* or not, was unquestionably the sole purpose for which the corporation associated itself together, and for which this complainant became a stockholder. Justice requires the corporation to repay the money it has borrowed and expended." *Maher v. City of Chicago*, 38 Ill. 268; *Darst v. Gale*, 83 Ill. 141; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *West v. Menard Co. Ag. Board*, 82 Ill. 205; *Ward v. Johnson*, 95 Ill. 215; *Peoria & Springfield R. R. Co. v. Thompson*, 103 Ill. 187.

We claim that not only has a person the right to make a contract with a company through a board of directors of which he is a member, but in the making of such contract he acts and is regarded as a stranger—a third party. And if the board of directors or agents with whom he is acting

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are even *de facto* officers, so allowed to act by the company, the contract entered into being not unreasonable or unfair, it will be binding upon the company and can be enforced.

In Angell & Ames on Corp., Sec. 223, 6th Ed., it is said: "By the common law and by the civil code too, as a corporation aggregate may contract with persons who are not members, so it may contract with persons who are members of it, and the contract is not on this account invalid—a member of a corporation contracting with it being regarded, as to that contract, a stranger. Hill v. Manchester Water Works Co., 5 Barn. & Ado. 1, 866; Rogers v. Danby University Soc'y, 19 Vermont, 191; Culbertson v. Wabash Nav. Co., 4 McLean C. C. (U. S.) 544; City of St. Louis v. Alexander, 23 Missouri, 483, 528.

In the case of The City of St. Louis v. Alexander, 23 Mo. 529, the court maintains the same doctrine—that a director may make a contract with the company of which he is a member, and cites, approvingly, Hayward v. Pilgrim Soc'y, 21 Pick. 270, and Angell & Ames on Corporations, saying that "Chitty says (Chitty on Contracts, 276, note E), a member of a corporation contracting with the company must be deemed, in respect to that contract, a stranger to the corporation."

MR. JUSTICE CARTWRIGHT. Appellee brought this suit upon a contract alleged to have been made and entered into with him by appellant, and set out in his declaration as follows:

"The Charter Gas Engine Company, a corporation of Sterling, Illinois, and John Charter, of same place, in settlement of all questions of royalties, and in lieu of all former contracts between them on the subject, do hereby mutually agree as follows:

Charter hereby grants to said company the exclusive right to manufacture and sell within and throughout the United States and the territories thereof, and in all countries where patents have not been obtained, gasoline engines under U. S. Letters Patent No. 465,388, granted to him

July 7, 1891, for the term of said patent, together with all improvements in gasoline engines which he may hereafter make during said term.

Charter also agrees to accept four thousand dollars (\$4,000) in full for royalties on engines made, sold and shipped by said company to July 1, 1891, and ten per cent on net sales of gasoline engines made and sold or shipped by said company subsequent to July 1, 1891, statements of sales to be made to him every ninety days and royalties to be then due and payable on all of said engines then sold and paid for, and in proportion to payments made on any not wholly paid for.

Said company accepts the above and agrees to make said engines of good workmanship and material, and to make all reasonable efforts to introduce and sell gasoline engines containing said patented improvements, and to supply all demand therefor; but in case said company shall be unable to fully supply such demand, said Charter shall have the right to procure additional manufacture of said engines elsewhere.

This contract, however, is made subject to the following mutually agreed upon conditions, to wit:

Said Charter shall prosecute to final issue all infringers of said patent, so as to protect this company in its monopoly under said patent, and in case this company and said Charter can not agree as to whether a certain engine made, sold or used by others, without permission of this company, is an infringement of said patent, said question shall be decided by two reputable patent lawyers or patent experts, one to be selected by each of the parties hereto, and said two so selected, if unable to agree, to mutually select a third person of like attainments to act with them; and the decision of said board or a majority of them, shall be conclusive and binding upon the parties hereto, and if said decision shall be that the construction in question is an infringement of said patent, said Charter shall prosecute, as aforesaid, the parties so offending, or otherwise suppress such infringement.

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And it is a further condition of this contract that said Charter guarantees to said company the validity of his aforesaid letters patent to this extent, that if said letters patent should hereafter be declared to be invalid, either by a court or a board of arbiters, which may be constituted as aforesaid, said company is to be no longer under obligations to pay royalties under said patent.

Executed in duplicate by the parties hereto, this 9th day of July, 1891.

[SEAL.]

CHARTER GAS ENGINE Co.,
G. M. ROBINSON, Pres.
JOHN CHARTER."

The declaration also contained the common counts. To this declaration the defendant pleaded the general issue, and filed four special pleas alleging that said contract constituted the only cause of action and setting up defenses thereto. The first of these special pleas alleged that defendant was organized in 1871, under "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," approved February 18, 1857; that the board of directors who assumed to make the contract in question, were not legal directors of the company, because elected at a pretended stockholders' meeting at which no notice was given to the stockholders as required by said act; that over one-third of the stockholders were not present and without notice or knowledge of the meeting; that such directors received a majority of votes by illegal cumulative voting of certain stockholders, and that plaintiff was a member of said board of directors who made the contract with him. The second special plea alleged that the contract was made upon the condition therein stated that plaintiff should, and would, protect defendant in its monopoly under the patent, but that the patent had been continuously infringed, whereby defendant was injured; yet the plaintiff, although notified, took no steps to interfere with infringements or to protect defendant. The third special plea alleged that the sole consideration of the contract was the representation of plaintiff

that the patent was valid and would give defendant a monopoly of the manufacture and sale of gas engines of the construction and operation described in the patent, but that the patent contained no novel device or combination and did not secure defendant a monopoly in the construction of the gas engines. The fourth special plea, as amended, alleged that at the time of making the contract the patent had not been received by plaintiff, but that he represented to defendant that when received it would secure a monopoly of the manufacture and sale of the essential parts of the gas engine as made by defendant, and demanded \$4,000 for royalties on manufactures by defendant from the date of application for the patent to July 1, 1891, and agreed that if defendant would pay said \$4,000, and ten per cent of net sales after July 1, 1891, that the patent would secure such monopoly, and that in consideration of that promise defendant entered into the contract; but that the patent did not secure a monopoly because the things claimed as plaintiff's invention were not new or novel.

A demurrer was overruled as to the first special plea and replications were filed thereto. Demurrers were sustained to the other special pleas, and defendant elected to stand by them, and now urges that the court was wrong in sustaining said demurrers.

The second special plea professed to answer the whole cause of action, but did not pretend to set up any defense to the promise to pay \$4,000 for past use of the patent, and was bad for that reason, and also because, under its averments, all that could be claimed by defendant would be the damage suffered, and no damages were alleged. The third special plea was bad because it failed to allege that defendant had been disturbed in the use of the patent. A licensee can not raise the question of the validity of a patent as between the patentee and the United States, where such licensee has not been molested; because in such case the licensee has got all he bargained for. *Marston v. Sweet*, 66 N. Y. 266; *Dean v. Hodge*, 35 Minn. 146. By the contract set out in the declaration defendant was only to be absolved

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from further payment of royalties upon the patent being declared invalid by a court or board of arbiters. The same rules apply to the fourth amended special plea as to the third, and it presented no defense to the declaration. We think that there was no error in sustaining demurrers to said pleas.

There was a trial and a verdict was returned for plaintiff for \$6,112.05, on which the court, after overruling a motion for a new trial, entered judgment.

The act under which appellant was organized provided for an annual election of officers, to be held at such time and place as the board of directors might designate, of which a written or printed notice should be given to each stockholder, personally, or sent to him through the post office, at least fifteen days before the day of election, at which election each stockholder would be entitled to one vote for each share of stock held by him. It appeared at the trial that a meeting of stockholders was held January 20, 1891, and that notice was not given as provided in said act. There was a publication of notice in a newspaper for two weeks prior to the meeting, but it was not equivalent to the notice provided by the act under which defendant was incorporated.

Every stockholder had a right to be present at that meeting, and it could not be legally held until after notice of the time and place had been given in an authentic and legal mode, unless all stockholders were present and consenting in person or by proxy. They were not so present. The whole number of shares was 1,078 and only 768 were represented at that meeting. It is claimed, however, that although the charter prescribed a mode of giving notice, it was not necessary to pursue that mode for the reason that a particular day was fixed by the by-laws. The by-law offered in evidence was as follows: "Article 1st. The corporation shall be under the control of a board of directors who shall be elected yearly, on the second Tuesday in June, in the city of Sterling, at such place and hour as shall be determined by the president and secretary, two weeks notice

of which time of election shall be published in some newspaper in the city of Sterling; and in case of the failure to elect on such day, for any cause, an election may be held on any Tuesday thereafter." The meeting in question was held in January, and the presumption that every stockholder knew the day in June appointed by the by-laws for the regular meeting would rather tend to prove the illegality of the meeting than its legality. Mr. Robinson, the president, testified that the time was afterward changed to January, but how or by whom does not appear. No record of any change appeared, and the only evidence of any day of which the stockholders had any notice by the records of the company was in June. Besides, if it be conceded that a by-law is notice of the day of a meeting so as to dispense with the notice required by the charter, a by-law like the one in question is still insufficient, because no place or hour is named. In *San Buenaventura Com. Mining and Mfg. Co. et al. v. Vassault et al.*, 50 Cal. 534, it was held that the fact that a by-law names a day upon which, instead of a week within which, the annual meeting is to be held, while it may diminish, does not remove the uncertainty as to the time at which it is to be held, and that such a by-law is insufficient as notice. Even if the month was changed from June to January, so as to afford notice to the stockholders, the necessity of the statutory notice was not thereby removed.

At that meeting the plaintiff and three of his associate stockholders cumulated their votes upon themselves for directors, while the other stockholders each cast one vote for each share of stock held by them for each of the seven directors. The four received a majority of the votes cast, and they were a majority of the board that subsequently acted as such. The evidence proved, however, that by counting only the votes which the parties cumulating their votes were legally entitled to cast, there was still a majority of votes for said four persons as directors.

The persons so chosen as directors elected a president and secretary and acted as directors until the next meeting of stockholders, January 19, 1892. Said board met three times

during the year, once to elect the president and secretary, and twice to make this contract. At the time of the meeting of January 20, 1891, and previous thereto, the defendant was manufacturing the same style of gas engine mentioned in the contract, which plaintiff claimed as his invention and continued to manufacture and sell the same. At a meeting of the directors held June 29, 1891, the plaintiff and two other directors were appointed a committee to confer with plaintiff regarding the matter of royalties, and such committee was to report to an adjourned meeting to be held July 8, 1891. At the adjourned meeting held on the latter date, the plaintiff and the other directors, except C. E. Tracy, being present, the contract was authorized by the board and it bears that date. Plaintiff was one of the committee to confer with himself and one of the board that directed the making of the contract. After the making of the contract there was no visible change in the business of the company, but it continued to make and sell the same engine as before.

The questions raised and argued in this court touching the validity of the contract are mainly whether the plaintiff, as an acting member of the board of directors, was incapacitated in law from contracting for his own benefit with the corporation which he represented, through the board of which he was a member, so as to bind the corporation; and if he was not incapacitated by his relation to the corporation, whether the directors, having been permitted to act as such, had power to bind the corporation, as a *de facto* board, by a contract with plaintiff, who had notice of the irregularity, and consequent infirmity of title to the office.

In considering the first question, the plaintiff is to be treated as a director, regardless of the manner of his election. Having claimed to be a director and acted as such, he is to be treated as such so far as his claim against the defendant is concerned. 1 Redfield on Railways, 584.

While a stockholder represents no interest but his own, a director occupies a trust relation toward all the stockholders. That relation demands that he should act in the interest of

those whom he represents. His authority is conferred upon the trust and confidence that it will be exerted only for the interest of the stockholders, and not for his private gain or advantage. Being so conferred, he is bound to manage the business intrusted to him in the interest of the stockholders alone, and by the most obvious rules of justice is forbidden to administer the affairs of the corporation for his private emolument. Accordingly, it has been held in numerous cases that a director can not, without the assent of the stockholders, become a contractor with the corporation, or have any personal or pecuniary interest in a contract between it and a third person, and that such contracts are voidable at the instance of the corporation or of stockholders. The corporation is entitled to the best efforts of the director for its exclusive benefit, and by entering into a contract with the board of which he is a part for his private gain, it is held that he disregards and violates his duty. He thereby places himself in a situation where his personal interests conflict with the interests of the stockholders and with the duties that he owes to them and the corporation. In *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 461, it was held to be a rule of universal application that no one having duties to discharge of a fiduciary character shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. In *Wardell v. Railroad Co.*, 103 U. S. 651, a contract had been made, by direction of an executive committee of the board of directors of the Union Pacific R. R. Co., with Godfrey and Wardell, which contract was assigned to a corporation in which directors of the company were stockholders, and it was said to be among the rudiments of the law that the same person can not act for himself, and, at the same time, with respect to the same matter, as the agent of another whose interests are conflicting, and that directors of corporations can not enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits.

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In *Gardner v. Butler*, 30 N. J. Eq. 702, it is said to be well settled that "directors of a company shall not be permitted to enter into engagements in which they have a personal interest conflicting with the interests of those whom they are bound by fiduciary duty to protect, and that no consideration of their apparent or intrinsic fairness will induce a court, either of law or equity, to enforce them against the resisting *cestui que trust*." It is held that a trustee can not fortify himself with a contract in violation of duty, and set it up either in law or equity as a valid obligation. In the case of *Thomas v. Brownville, Fort Kearney and Pacific R. R. Co.*, 109 U. S. 524, a contract made by directors of a railroad company with a construction company in which they were interested was held voidable, and stockholders having repudiated the contract it was held void. The rule that a trustee can not enter into any relation or place himself in any position which would subject him to conflicting duties or expose him to the temptation of acting contrary to the best interests of his *cestui que trust* applies to directors, and a contract connected with the trust or its management entered into in violation of duty is voidable, and may be defeated or set aside at the suit of the beneficiary. 2 Pomeroy's Eq. Jur., Sec. 1077; *San Diego v. San Diego & L. A. R. R. Co.*, 44 Cal. 106; *Barnes v. Brown*, 80 N. Y. 527; *Risley v. I. B. & W. R. R. Co.*, 62 N. Y. 240; *Railroad Co. v. Poor*, 59 Me. 277; *Flint, etc., Railroad Co. v. Dewey*, 14 Mich. 477; *Paine v. L. E. & L. R. Co.*, 31 Ind. 283; *Hoffman Steam Coal Co. v. Cumberland Coal Co.*, 16 Md. 456; *Simons v. Oil Co.*, 61 Penn. St. 202; *In re Coalbrook Railway Co.*, 18 Beav. 339; *Coal Co. v. Sherman*, 30 Barb. 553.

It is contended that the question has been settled in this State the other way. We do not so understand. The only questions that have been before the Supreme Court, so far as we know, relate to the right of directors or officers to loan money to the corporation and take securities, and to obtain payment of debts due them from the corporation. In *Merrick v. Peru Coal Co.*, 62 Ill. 472, the question was

whether Merrick, who was an officer of the corporation, and who had purchased with his own means, notes and drafts made by the corporation to persons in no wise connected with it, and which were undeniably binding upon it, could sue and recover from the corporation the money paid for the same. It was there said that an officer of a corporation has a right to deal with it in the same manner as strangers may, and in such case each party acquires the same rights and incurs the same liabilities as would strangers; but the only kind of dealing that was in question was that above stated, and the court subsequently refused to be bound by what was said.

In *Harts v. Brown*, 77 Ill. 226, the question was whether a director could loan money to the corporation and take a mortgage on corporate property with a power of sale. In that case the Supreme Court said: "We have never known it questioned that a director or stockholder may trade with, borrow from or loan money to the corporation of which he is a member, on the same terms and in like manner as other persons. He then had power to loan money to the company and they became liable to pay the same." This statement was evidently intended to refer only to a loan of money.

Darst v. Gale, 83 Ill. 136, was a bill to enjoin a sale on a trust deed executed by a corporation to Pulsifer and others, and it was held that the fact that Pulsifer was for a time one of the directors of the corporation, in the absence of evidence showing bad faith in his transactions with the company, was of no moment; and that he might, acting in good faith and fairly, as lawfully advance money to the corporation, upon the faith of its securities, as any one else.

In *Beach v. Miller*, 130 Ill. 162, Miller, who was a director, had loaned the corporation \$2,000 and taken judgment notes. The president and secretary sold to him property to the amount of \$1,877, to be applied as a payment on the notes. The judgment in favor of Miller, based on rights claimed under that sale, was reversed on account of a refusal to admit evidence of the insolvency of the corporation at the time of the sale, and it was held that the facts offered

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to be proven were proper for the consideration of the jury on the question whether the sale to Miller was fraudulent as to other creditors. It was there said: "While a corporation remains solvent, we perceive no reason why a director, with the knowledge of the stockholders, may not deal with the corporation, loan it money, take security or buy property of it, in like manner as a stranger. * * * So long as a corporation remains solvent, its directors are agents or trustees for the shareholders. They owe no duties or obligations to others."

But it was held that if the corporation was insolvent, the directors would occupy a different relation and hold its assets in trust for creditors, and in that event Miller could not take the property purchased in exclusion of the other creditors, but would take it charged with a trust in favor of all creditors, himself included, and all should share in it. It was there further said that the expressions made in *Merrick v. Peru Coal Co.* and *Harts v. Brown*, *supra*, to the effect that a director had a right to deal with his corporation the same as a stranger, were not authorized by the cases under consideration.

In *Roseboom v. Whittaker*, 132 Ill. 81, the rule laid down in *Beach v. Miller*, *supra*, and above quoted, was repeated and affirmed. By that rule the directors of a corporation during its solvency are agents or trustees for the stockholders, and it is made a condition of their right to deal with the corporation that such dealings shall be with the knowledge of the stockholders.

The requirement of knowledge presupposes a right in the stockholders of approval or rejection of proposed dealings, for knowledge merely would be of no avail unless for the purpose of enabling them to exercise a right.

In none of these cases was there any contract of the nature of the one in question, and they all come within a recognized exception to the rule, as will be hereafter seen.

In *Beach v. Miller* the court refers to the following cases as announcing the correct doctrine concerning dealings of a director with his corporation. *Twin Lick Oil Co. v. Mar-*

bury, 91 U. S. 587; Whitehall v. Warner, 20 Vt. 425; Smith v. Lansing, 22 N. Y. 526; City of St. Louis v. Alexander, 23 Mo. 483.

[Twin Lick Oil Co. v. Marbury was a case where Marbury, who was a director of the Twin Lick Oil Co., loaned the corporation \$2,000, for which a note was given secured by a trust deed. The property was sold under the trust deed and bought for Marbury and conveyed to him. The bill in the case was filed four years afterward, to have him declared a trustee of the corporation and for an accounting. The court found that the loan was made in good faith, to assist the corporation in embarrassment, and that the purchase by Marbury was the only way for him to make his money. The court said that contracts of directors with their corporations were generally not absolutely void, but voidable, and that no rule of law forbade a director loaning money to the corporation in good faith when it was needed. Such a rule, it was said, would deprive a corporation of the aid of those most interested in it and most likely to render assistance, and would afford no protection to the corporation. The court declined to decide whether the sale and deed were voidable at the election of the company, because the company came too late with the offer to avoid the sale.

The case of Whitewell v. Warner, 20 Vt. 425, holds that constructive fraud is not to be predicated of the mere fact of a stockholder availing himself of his superior advantages to obtain security for debts due to himself to the exclusion of other creditors; and that while the courts would no doubt guard the exercise of such a privilege with some degree of severity, yet they should not watch the exercise of a right with so much strictness as to declare its mere exercise to be a constructive fraud.

The case of Smith v. Lansing, 22 New York, 520, was a suit by Smith, as receiver of a bank which had no board of directors, against Lansing, who was president and managing officer and agent of the bank, which had applied for and received deposits of canal moneys of the State of New York, upon condition that it should give security for the return of

such deposits; and Lansing had entered into bonds for the repayment of the moneys so deposited, and had purchased in his own name three parcels of real estate upon which the bank had mortgages, and the entire consideration paid or allowed was the money and property of the bank. He took the conveyances to himself for the purpose of securing himself and his co-sureties for their liabilities aforesaid.

The judge below held that the defendant could hold the lands to secure himself and his co-sureties for the sum of \$48,501.78, which they had paid or remained liable to pay, and he ordered judgment for a conveyance to the receiver, upon his paying that sum, or that, at the election of the plaintiff, the lands should be sold and the first proceeds appropriated to indemnify the president and his co-sureties. This judgment was reversed at the general term, but was affirmed by the Court of Appeals. It was said: "It is undeniably a well settled general rule that where one acts as agent, trustee, guardian, executor, or administrator in the purchase or sale of property, or in the transaction of other business, in a fiduciary relation, the law will not permit him, in such purchase, sale or transaction, to act in his own name and for his individual benefit. This rule has been established in consequence of the liability of mankind to be influenced by the motive of selfishness, which would, in most cases, lead the agent, etc., to give an undue prominence to his own interest, to the injury of that of his principal, etc. 'This rule,' says Judge Story, 'is founded on the plain and obvious consideration that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and, if impartiality could possibly be presumed on the part of the agent, where his own interests were concerned, that is not what the principal bargains for; and, in many instances, it is the very last thing which would advance his interests.' Story on Agency, Secs. 210, 211, and authorities there cited. In the case of *Moore v. Moore*, 1 Seld. 256,

Judge Gardiner uses the following language: 'The law does not stop to speculate upon the probabilities that the agent has resisted temptation; it removes the temptation, by proclaiming in advance that he shall not acquire the property. The rule is a most reasonable and wholesome one, and has been too long settled to require the approbation of this court to commend it to the judgment and conscience of every intelligent mind for its support.' If, therefore, the present case falls within the influence of this principle, the judgment of the general term of the Supreme Court should be affirmed."

It was held, however, that the case did not come within the rule; and that it was lawful for Lansing to apply for and receive the moneys, and his duty to do so, if he supposed they could be used to advantage in the business of the association. The moneys could not be obtained without security beyond the corporate responsibility of the association; he was then bound to furnish such security, if in his power, and in doing so it was lawful for him to pledge the property of the association to indemnify the sureties. He procured others to unite with him on the bonds, and had a right to indemnify himself and his co-sureties through the property and means of the association against his and their liabilities so incurred. To secure such indemnity was a duty the defendant owed not only to himself, but pre-eminently to the sureties whom he had procured to be bound with him; and it was held that what was fairly and honestly done for such purpose should be allowed to stand.

The case of *City of St. Louis v. Alexander*, so far as the question of the right of a director to deal with the corporation was involved, related only to the right of such director, who is also a creditor, to use any fair means to obtain security for his debt.

It will be seen, therefore, that the cases referred to by the Supreme Court in *Beach v. Miller*, were of the same character as the cases decided by that court, and did not relate to the right of a director to enter into a contract of the nature of this one, by which \$4,000 was to be transferred from the

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assets of the corporation to the director, and he was to have ten per cent of the proceeds of its business for a long term of years. The cases either relate to making advances to, or incurring liabilities for the corporation in good faith and obtaining payment or security therefor, or belong to the class of *Beach v. Miller*, which was merely a competition among creditors, where the corporation had no interest. It is not supposed, because a creditor is also a director, that he is thereby disqualified from entering into fair competition with other creditors. This case involves the question whether a director having duties of a fiduciary nature to discharge toward stockholders shall be allowed to enter into a contract of this kind, in the making of which he has a personal interest conflicting with the interests of the stockholders whom he is bound to represent and protect, and shall be allowed to enforce such contract against the resisting corporation. We have not been able to find any case where such a contract has been so enforced, and we think that this one can not be.

As held in *Twin Lick Oil Co. v. Marbury*, *supra*, a loan of money to the corporation when needed is not within the rule, because to apply the rule in such case would deprive the corporation of aid and afford it no protection. See also *Sutter Street R. R. Co. v. Baum*, 66 Cal. 44, where it is held that a director may advance money to the corporation in good faith. 1 *Beach on Private Corporations*, Sec. 245. So in *Duncomb et al. v. N. Y. H. & N. R. R. Co. et al.*, 84 N. Y. 190, it is said that the rule can have no application where the transaction consists in the officer taking collateral security for a debt honestly due him, since the payment of the debt or the discharge of the liability is an essential prerequisite of the avoidance of the transaction; but the general rule of a disability imposed upon a director to deal in his own behalf in respect to any matter involving his duties to the stockholders is distinctly recognized.

Advances of money by directors in good faith and in case of need, and taking security for repayment, are upheld by the courts, and a rule against them would be injurious

rather than beneficial to stockholders. Besides, there is no rule which prohibits a corporation from availing itself of property of a director necessary for its convenience or profit, under circumstances implying a contract to pay a reasonable compensation therefor. *Rider v. Union India Rubber Co.*, 5 Bosw. 85. If money has been advanced or property furnished in good faith by a director, the corporation is liable to him on an implied assumpsit. The rule is not made to enable a corporation to appropriate the money or property of a director for less than it is reasonably worth, and there may be a recovery of such reasonable worth. So that in case of a loan there is an enforceable implied contract regardless of the express contract. The rule is adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and there may be a recovery upon a *quantum meruit*. *Wardell v. Railroad Co.*, 103 U. S. 651; *Gardner v. Butler*, 30 N. J. Eq. 702.

The view we have taken of the contract renders it unnecessary to consider the question concerning the power of a *de facto* board as between a member of such board and the corporation, since the liability of the corporation for the value of the right appropriated and used would be the same in any view of that question. There would be an implied contract to pay what the use of the patent was reasonably worth.

There are some objections to instructions given for plaintiff. The first told the jury that if two-thirds of the capital stock was represented at the meeting at which plaintiff and his associates, James Charter, L. M. Barrett and C. F. Tracy, were said to have been elected, and that a majority of the stock so represented was cast for the said four directors, then said directors should be considered legally elected. It ignored the question whether any notice was given which would authorize holding the meeting at all, and was bad. The third stated that although the jury might believe that the contract was made by a board irregularly elected, yet if they further found from the evidence that defendant, by its subsequent conduct, ratified the making of such contract,

they should find for plaintiff. As it is a question of law what will make a valid contract, so it is a question of law what will make it valid as a ratification, if proven; and the instruction was wrong in allowing the jury to determine that the contract was ratified from any fact appearing in evidence which they might fancy a ratification.

The fourth and fifth stated that if defendant made and sold gasoline engines according to the contract, then the defendant had ratified the contract. No one could ratify the contract except those who could have made or authorized it, and the only evidence of action under the contract and in acknowledgment of it was by the persons who made it.

They could not ratify their own contract so as to bind any one whom they could not bind by making it. *Paine v. L. E. & L. R. R. Co.*, 31 Ind. 283. Such a contract is not void, but voidable at the election of the parties affected; and while the stockholders might prefer to ratify it, or submit to it, yet the ratification or acquiescence which would prevent them from resisting it must be established by their conduct. The right to repudiate must be lost by affirmative act, or by unreasonable delay after opportunity to act with freedom, and with full knowledge of all material facts.

In *Mallory v. Mallory Wheeler Co.*, Supreme Court of Errors, Conn., June 1, 1891, 5 Am. R. R. & Corp. Rep. 509, a suit for salary as manager and director of a corporation was successfully defended against on the ground of the personal interest of the directors making the contract. The contract was entered into October 31, 1887. There was a stockholders' meeting in May, 1888, and there was no evidence that the stockholders knew of the contract before that, and there was no other meeting until the annual meeting in May, 1889, when a new board of directors was chosen, that repudiated it; and it was held that the delay could not operate as ratification, waiver, acquiescence or estoppel, and that the right of the corporation to avail itself of the original invalidity of the contract was not lost. Such a contract, being voidable merely, does not necessarily require any inde-

pendent and substantive act of ratification; but it may become finally established as a valid contract by acquiescence for such a length of time as would amount to a waiver of the right to avoid it. *Kelly v. N. & A. Horse R. R. Co.*, 141 Mass. 496. But the contract did not become binding on the stockholders from the fact that there was some manufacture and sale of gasoline engines by the same board that made the contract.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY

V.

MARGARET E. FEEHAN, ADMINISTRATRIX.

Railroads — Negligence — Personal Injuries — Crossings — Signals — Excessive Rate of Speed — Ordinance.

1. In an action brought to recover from a railroad company for the death of a person alleged to have been occasioned through its negligence, this court holds that although the third count of the declaration filed, charging generally that the train was run at a "great and unlawful rate of speed," in contravention of a municipal ordinance, was subject to demurrer, that it was nevertheless sufficient to show that the plaintiff relied as a ground of recovery upon an ordinance, and the running of the train at greater speed than allowed thereby, whereby such death was occasioned; the fact being that the section of the ordinance was set out in full in the count, and issue having been taken on the charges made as a basis of liability, plaintiff had a right to prove them.

2. It is proper in such case to exclude the testimony of a witness at the coroner's inquest, he testifying differently upon trial, and admitting and explaining his action, no statement claimed to have been made before such jury, and not admitted by him, being in conflict with his testimony as given on the trial.

3. The issues in the case presented involving the question of care on the part of the deceased, evidence of the location of an elevator, box car, stock yards, coal shed and corn crib, on the railroad grounds, affecting the view of the train approaching the crossing, was admissible upon that issue as descriptive of the place where the accident occurred, to en-

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A., T. & S. F. R. R. Co. v. Feehan.

able the jury to determine whether he did, or could, see the approaching train.

4. A court has no right to instruct the jury in a given case as to what they may regard as the better testimony.

5. This court will not consider an objection to an instruction raised for the first time in the reply brief of an appellant.

6. The fact being established in the case presented that the defendant at the time of the accident was violating the ordinance by running at an excessive speed, the presumption was that the killing arose through such negligence, there being nothing to show that the accident would have happened in case the train had been run in obedience to the ordinance, or that it was due to some other cause than the negligence of defendant in that regard.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Grundy County; the Hon. CHARLES BLANCHARD, Judge, presiding.

MESSRS. EDGAR A. BANCROFT and S. C. STOUGH, for appellant.

MESSRS. E. L. CLOVER and GEORGE W. W. BLAKE, for appellee.

MR. JUSTICE CARTWRIGHT. Appellee, as administratrix of the estate of her deceased husband, Edward Feehan, brought this suit against appellant to recover damages for the killing, by a train of appellant, of said Edward Feehan, while driving a team across the railroad at the crossing of a street in the village of Kinsman.

The declaration contained six counts. The first count charged negligence and improper conduct generally in driving and managing the engine and train. The second alleged a failure to give the statutory signal in approaching the crossing. The third charged that the engine and cars were run at a great and unlawful rate of speed within the limits of said village of Kinsman, in consequence of which said Edward Feehan was struck and killed; that said village was incorporated; that section one of the ordinance of said village entitled "An ordinance regulating the speed of cars or locomotives upon a railroad," was as follows:

“Sec. 1. That no locomotive engine attached to any railroad passenger-car shall be driven, propelled or run upon or along any railroad track within the village of Kinsman at a greater speed than ten miles per hour; nor shall any locomotive engine attached to any freight car be driven, propelled or run upon or along any railroad track within said village at a greater speed than ten miles per hour.” And that the said injury was occasioned by reason of the negligence of the defendant in running its said locomotive engine and train of cars at a greater rate of speed than allowed by the said ordinance of said village. The fourth count charged negligence in failing to ring any bell, as required by section five of said ordinance. The fifth was a consolidation of the third and fourth. The sixth alleged the existence of obstructions to the view, but contained no allegation of negligence or any charge against the defendant, and stated no cause of action.

A plea of not guilty was interposed and a trial was had on the issues so made. The court held on the trial that section five of the ordinance was unreasonable and therefore void; and the charges in the fourth and fifth counts based on that section were thereby eliminated from the controversy and are not now in question. The trial resulted in a verdict for plaintiff for \$3,000. Motions for a new trial and in arrest of judgment having been made and overruled, judgment was entered.

It was proven on the trial that the train was running through the village, at the time of the accident, at the rate of twenty-five to thirty miles per hour. In order to prove section one of the ordinance on that subject, plaintiff offered the same in evidence as contained in a book admitted to be the ordinances of the village of Kinsman, and which was the same ordinance set out in the declaration, as above stated. Defendant objected to its introduction, as follows: “Because it is not pleaded that it was in force at the time of the accident, nor that the speed was faster than permitted, nor that the accident resulted in consequence of the speed.” The objection was overruled, and this ruling is complained of.

The third count, although perhaps subject to demurrer, was nevertheless sufficient to show that plaintiff relied as a ground of recovery upon an ordinance of the village of Kinsman and the running of the train at an unlawful rate of speed greater than allowed by such ordinance, whereby the killing of Edward Feehan was occasioned. It has been held by the Supreme Court that a plea of the general issue is an admission in law upon the record of the sufficiency of the respective counts to which it is pleaded. *C. & N. W. Ry. Co. v. Goebel*, 119 Ill. 515. At any rate the defendant was notified by the count of the grounds relied upon for a recovery, and they constituted a good cause of action although somewhat defectively stated. The section was set out in full in the count, and issue having been taken on the charges made as a basis of liability, plaintiff had a right to prove them. *L. S. & M. S. Ry. Co. v. O'Conner*, 115 Ill. 254.

Barney McMiniman, a witness who testified at the coroner's inquest, also testified on the trial of this case, and it is assigned as error that the court excluded his testimony taken by the coroner when offered by defendant to show differences in his testimony on the two occasions. The witness when interrogated as to those matters, admitted that he testified differently before the coroner as to seeing Feehan, and offered his explanation of the reason. He admitted making some other statements claimed to have been made before the coroner's jury, and no statement claimed to have been so made and not admitted by him was in conflict with his testimony as given on the trial. The offered evidence was therefore not impeaching and was rightly excluded.

It is objected that the court admitted evidence of the location of an elevator, box car, stock yards, coal shed and corn crib on the railroad grounds, affecting the view of the train approaching the crossing. It is claimed that there is no allegation of the declaration under which they were admissible. The issues involved the question of care on the part of the deceased and the evidence was admissible upon that issue as descriptive of the place where

the accident occurred to enable the jury to determine whether he did or could see the approaching train.

It is also urged that the court erred in giving and refusing instructions. Under this head it is complained that the court gave the first instruction for plaintiff, which only required the exercise of care on the part of deceased at the time he was killed, and refused defendant's eighth, tenth, eleventh and twentieth, which required the exercise of care and caution on his part in approaching the crossing. The first instruction for plaintiff might possibly be understood as claimed, but the court explained the rule fully to the jury in instructions given at the instance of defendant. By the twenty-fourth the jury were told that there could be no recovery unless the deceased at the time of the collision and immediately preceding it was using reasonable care and caution. The twenty-sixth stated "that it was the duty of the deceased, on approaching the railroad in question, and before attempting to cross it, to look and listen for approaching trains, and adopt all other means to avoid a collision that a reasonably cautious and prudent person, under such circumstances, would have adopted."

The twenty-seventh laid down as a rule, that although the statutory signals were not given, and the rate of speed was in violation of the ordinance, and the view of the approaching train was partially or wholly obscured, yet there could be no recovery if deceased approached the crossing in a way and manner and under circumstances that a reasonably prudent and cautious man would not and should not have done, unless the injury was wanton or wilful.

The twenty-eighth told the jury that the fact that the train was behind schedule time would not exonerate the deceased from using reasonable care and caution while approaching the railroad. In view of these instructions it does not seem possible that the jury could have been ignorant of the requirement therein stated that deceased was bound to exercise care in approaching the crossing, or that defendant suffered injury from a failure to give four additional instructions that such was the rule.

The court refused to instruct the jury in substance and

effect that greater weight and force was to be given to the testimony of the witnesses on the defendant's side of the question of the ringing of a bell and sounding of a whistle than on the other side. The court has no right to say what the jury may regard as the better testimony. It would have been wrong to give the instruction. *C. & A. R. R. Co. v. Robinson*, 106 Ill. 142; *Martin v. People*, 54 Ill. 225.

Appellant in the reply brief raises for the first time an objection to plaintiff's second instruction. The point need not be noticed for that reason, but the instruction is in accordance with the rules declared by the Supreme Court on the subject of comparative negligence.

It was proven and not denied that defendant was violating the ordinance at the time of the accident. That fact being established, the presumption was created by virtue of section 24 of an act in relation to fencing and operating railroads, in force July 1, 1874, that the killing of deceased was done by the negligence of defendant. Chap. 114, R. S., Par. 87. It was for the defendant to rebut that presumption, and this, we think, was not done. There was nothing to show that the accident would have happened in case the train had been run in obedience to the ordinance, or that it was due to some other cause than the negligence of defendant in that regard.

The remaining question of fact relates to the degree of care exercised by the deceased, and it is strenuously insisted that he was not in the exercise of ordinary care for his own safety. He lived in Kinsman and was employed to drive about the country and gather cream and deliver groceries. He hitched his team that morning, August 24, 1891, to the wagon which he used, which was covered on the top and sides, and drove toward the depot to get cream cans before starting to gather cream. The seat was near the front with just room to get out and in between it and the dashboard, and the cover extended forward to the middle of the seat or about that far. It had been a damp and foggy night and was raining a little. There were two trains of defendant which passed that station in the morning—the vestibule train which usually passed first and did not stop, and the accom-

modation, which was due later and stopped there. On this morning, the accommodation train had passed and the vestibule train which usually passed first was thirteen minutes late and was running at a rapid rate. As Feehan approached the tracks the view was obstructed in the vicinity of the tracks by the obstructions above mentioned until he was quite near. The team was walking and was almost on the track before it was seen by any witness. Barney McMiniman and the engineer were the only witnesses who saw the team before it was struck. McMiniman was easterly from the crossing and testified at the inquest that he saw the team, but did not see Feehan. On this trial he said that he saw the back of Feehan's head, and if that was true, Feehan's face was turned toward the train. The credibility of that witness was for the consideration of the jury. They saw him and heard him testify, and might properly conclude that his later statement was true, and that his statement before the coroner's jury was due to his confusion, as he asserted that it was. The testimony of the engineer tends to prove that Feehan could not see the train if his face was turned toward it, for he testified that he could not see the team until after it passed the cattle guard coming across the side track and when practically on the track.

The preponderance of the evidence was that the bell was ringing, but McMiniman, who was near by, testified that he did not hear it, and we would not feel authorized to disturb a finding of the jury that Feehan could not hear it. We are not able to say that the jury were wrong in their conclusion that the deceased exercised ordinary care.

There was a motion in arrest of judgment as a test of the sufficiency of the declaration to support a judgment. There were good counts in the declaration, and so far as the ordinance was counted on, the declaration was good after verdict. The motion in arrest was properly overruled. The judgment will be affirmed.

Judgment affirmed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY
V.
THE CITY OF OTTAWA.

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148 397

Railroads—Municipal Ordinance—Gates at Street Crossings—Injunction to Restrain the Prosecution of Suits.

1. A court of chancery has no jurisdiction to restrain and enjoin the prosecution of a suit based upon the violation of a municipal ordinance and to settle the legality thereof.

2. No matter how numerous the suits may be, equity will not interfere on the ground of the invalidity of the ordinance under which the prosecution is had, or the innocence of the party complaining.

3. Upon a bill filed by a railroad company to enjoin the prosecution of thirteen suits at law, brought by a municipality against it under an ordinance of the city requiring complainant to put gates at certain street crossings to protect persons crossing over its track against injury from trains on its road passing through said city, this court holds that the case presented comes within the general rule.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. SAMUEL RICHOLSON and O. T. PRICE, for appellant.

Mr. DANIEL R. BURKE, for appellee.

MR. JUSTICE LACEY. This was a bill in equity by appellant to enjoin the prosecution of thirteen suits at law brought by appellee against it under an ordinance of the city of Ottawa requiring the appellant to put gates at certain street crossings to protect persons crossing over its railroad track against injury from passing trains on its road passing through the city.

The nature of the ordinance was that it required the appellant to provide protection against injury to persons and property wherever its railroad track crossed any street, by the erection and maintenance of gates and guards and other protection, when the city council by resolution should so declare and direct; that it should within a certain time, to be fixed by the city council, erect, construct and maintain sufficient safeguards at crossings, specifying the kind of protection to be erected, constructed and maintained as aforesaid, whether it be a gate or gates, or other protection, and providing for service of a certified copy of such resolution by the city marshal on the appellant within ten days after the passage of the resolution, at the same time notifying the appellant in writing of the time fixed by the city council within which the protection so ordered should be constructed. The ordinance further provided that whenever any railroad company shall have been directed by the city council to construct, and maintain at any street crossing by its track or tracks, any gate or gates or other protection, etc., every such company should, within the time prescribed by the city council, construct and thereafter maintain the protection specified in the said resolution, under a penalty of not less than \$100 nor more than \$200 for each offense; and for each and every ten days after the expiration of the time so fixed for the construction of such protection, if any such company shall refuse or neglect to proceed to the erection and construction of the kind of protection specified in said resolution, it should constitute a new and distinct offense.

The city council, in 1891, by resolution, required appellant to erect, construct and maintain suitable and proper gates so as to protect all persons crossing its tracks at street crossings on both sides of its tracks, to wit: One set of gates on Main street, at Madison street, at Jefferson street, Lafayette street and at First street; each and all of said streets above named upon which a separate set of gates is required as above stated being within the city of Ottawa, La Salle County, Illinois; said gates to be erected within

thirty days after notice. After the passage of the resolution, to wit, on the 22d day of October, 1891, the proper notice was served upon appellant.

The thirteen suits in question were brought by the appellee one after another for appellant's failure to comply with the ordinance and to recover the penalty therein specified for such failure.

The prayer of the bill was, upon a final hearing, that appellee should be restrained from prosecuting under said ordinance, so far as relates to the erection of gates and to maintain same to the satisfaction of the superintendent of streets, and for a temporary writ of injunction restraining appellee from prosecuting suits against appellant excepting the two suits pending in the Circuit Court, and for general relief. To this bill the appellee filed its demurrer on the grounds that a court of chancery has no jurisdiction to enjoin the prosecution for the violation of a city ordinance, and that a court of equity could not interfere to restrain, by injunction, their enforcement in the proper court on the ground that such ordinances are alleged to be illegal, as was done in the bill, or because of alleged innocence of the party charged, nor for the purpose of determining the validity of an ordinance in a court of equity.

The bill set up under various allegations, and for various reasons, that the ordinance of appellee and resolution of the city council were void in law, and that no prosecution could be had and maintained against the appellant for failure to comply with their provisions. The court sustained the demurrer to the bill and, the appellant abiding his bill, entered a decree dismissing it and giving judgment against appellant for costs. From this decree this appeal is taken.

The appellant has filed an elaborate argument to show that the court below had jurisdiction in equity to grant the injunction prayed for, and also to prove that the ordinance and resolution of the city council were illegal and void and beyond the power of jurisdiction of the city of Ottawa to pass.

On the other hand, the appellee contends that a court of

equity has no jurisdiction to grant an injunction to restrain prosecutions for violence of city and village ordinances.

If we hold that this point is well taken, then the decree of the court below should be affirmed without reference to the validity of the ordinance and resolution of the city council in question. Upon examination of the authorities, we feel constrained to hold that in this State a court of chancery has no jurisdiction. As a general rule it has been held in this State by the Supreme Court that there is no such jurisdiction. The cases referred to are *Gates v. The Village of Batavia*, 79 Ill. 500, and *Poyer v. The Village of Desplaines*, 123 Ill. 111.

In the first case above named, the purpose of the bill was to restrain and enjoin the prosecution of certain suits against each of the complainants for violation of the village ordinance and to settle the legality of the same, providing against the evils resulting from the sale or giving away of intoxicating liquors. The court in passing upon the case used the following language:

“A court of chancery has no jurisdiction of the subject of this litigation, nor is it in the power of the parties to waive the question relating to the jurisdiction of the court and compel it to try the cause. Whatever defense, if any existed to the several actions against complainants, was complete in a court of law where they were pending, and the court very properly dismissed them to that forum.”

The object of the bill in the *Poyer* case, *supra*, was to restrain the village of Desplaines from prosecuting suits pending against the complainant for violations of the village ordinances. The ordinance, it appears, complained of, was one declaring as a nuisance the use of certain picnic grounds near the village, owned and rented by the complainant for profit to certain persons for picnic purposes, providing a penalty for a violation of the ordinance. *Poyer* had been sued and fined fifty dollars for a violation of the ordinance and six other cases had been commenced against him to recover for certain other alleged violations of the same ordinance. The court held the bill bad on demurrer and the Supreme Court holds the following language, to wit:

“Courts of equity will not, as a general rule, interfere to restrain criminal or quasi criminal prosecutions or take jurisdiction of any cause or matter not strictly of a civil nature. Story’s Eq. Jur., Sec. 893; 2 Daniell’s Chancery Practice 1620; Montgomery R. R. Company v. Walton, 14 Alabama, 209.” And further deciding, the court says, “the legality or illegality of the ordinance is purely a question of law which the common law court is competent to decide.”

The court, in further commenting upon the case, in answer to the claim that equity might have jurisdiction to prevent the multiplicity of suits says: “Bills of peace will lie under some circumstances for the purpose of quieting and suppressing litigation. It is said, however, that to entitle a party to maintain a bill on this ground there must be a right claimed affecting many persons; for if the right is disputed between two persons only, not for themselves and others in interest but for themselves alone, the bill will be dismissed. 2 Story’s Eq., 857.”

It plainly appears, from the above decisions of the Supreme Court of this State, that equity will not entertain jurisdiction, as a general rule, to prevent or restrain the prosecution of suits against one who violates a city or village ordinance, however numerous those suits may be, on the ground of the invalidity of the ordinance under which the prosecution is had or the innocence of the party complaining. This rule, then, will apply to this case and will be decisive of the question unless there is something peculiar in the facts which would take it out of the general rule.

The appellant, as we understand, claims that the facts are such as, notwithstanding the above decisions of the Supreme Court, to take the case out of the general rule and to give equity jurisdiction. They are, in substance, that if the relief in equity be denied, the appellant would be compelled to surrender its charter or suffer a long and expensive litigation, and be compelled to expend money for work and material in making, erecting and putting in operation the gates required by the ordinance and resolution of the common council, which could never be recovered, even if in the end it were

successful in defeating the wrongful prosecutions under the ordinance; and there would be a multiplicity of suits. We fail, however, to see that there is any difference in this case in principle as to the circumstances existing, and the two suits passed upon by the Supreme Court.

There is only one thing that can be claimed as such, with any show of plausibility, and that is that in this case, in order to escape prosecution being multiplied under the ordinance, it would be obliged to expend money in erecting the gates in question, whereas, in the other two cases, the only thing the prosecuted parties would have to do to prevent such prosecutions would be not to violate the liquor ordinance in the one case and not to rent the park to picnickers in the other.

We conceive, however, there is not much difference in principle in this regard, for the liquor seller in the one case may lose the opportunity to sell his stock of liquors for a profit, and the other to lose the use of his park by being prevented from renting it.

It will be seen that the appellant need not put up the gates if the ordinance is void, for it will succeed in the end in defeating all the prosecution and throwing the cost of the litigation on the city. The same would be the case with the liquor seller and the owner of the park. Neither party would sustain any irreparable loss except the trouble and expense of litigation which the court seems not to regard as irreparable.

It is deemed the better policy and better rule to deny jurisdiction in this class of cases to a court of equity, and we see no good reason in law why this case should be made an exception to the general rule.

Seeing no error in the record of the court below the decree is affirmed.

Decree affirmed.

Anderson v. Montgomery.

JOHN C. ANDERSON
v. •
WILLIAM A. MONTGOMERY.

Written Contract—Reformation and Enforcement of—Appeal and Error.

1. Parties to a suit having submitted themselves to the jurisdiction of a given court, can not attack such jurisdiction below nor upon appeal.

2. Upon a bill filed for the reformation and enforcement of a written contract, this court holds, upon consideration of the evidence, that the same lacks that degree of certainty which justifies the changing of a written instrument in view of parol evidence.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding.

Messrs. FREE P. MORRIS and F. L. HOOPER, for appellant.

Messrs. KAY & KAY, for appellee.

MR. JUSTICE LACEY. This is a bill in chancery filed in the Circuit Court of Iroquois County, on the 19th day of April, 1890, by appellee against appellant, John Will Anderson, and one William Warren. All parties being duly in court, appellant and John Will Anderson answered the bill. Warren was defaulted. On replication being filed cause was referred to the master. The master's report was filed March term, 1891, and a hearing had.

The cause was taken under advisement by the then chancellor, and at the June term, 1892, a decree was entered for complainant, dismissing the bill as to John Will Anderson, and ordering appellant, John C. Anderson, to pay appellee the sum of \$172.62 within twenty days, and that in default

thereof execution issue. The bill seeks the reformation of a written contract and to have the contract reformed and corrected, and enforced as reformed or corrected. The averments of the bill are in substance that in 1888 and 1889 William Warren, one of the respondents, was engaged in the manufacture of brick and tile on the premises rented of appellant; that Warren, during the year 1888, became indebted to appellee for cord wood sold to Warren to be used in burning of the said brick and tile; and that in July, 1889, Warren sold his stock of brick and tile to appellant and entered into a contract, dated July 13, 1889; that on a trial before a justice of the peace, wherein appellee sued said Warren for said wood furnished, the original contract referred to was not to be found and a copy was substituted which was claimed by said Warren and appellant to be a true copy of the original, and sets forth the substance of the contract as follows: reciting the purchase of the brick and tile on hand, burned and unburned, in the tile factory or kilns on or near the railroad factory, and any balance on shipments of tile made since April 1, 1889; appellant agreeing to pay all arrears of labor performed at said factory since 1889, also for all wood used in burning brick and tile during the season of 1889, and to pay the following named persons on such terms and time as he and they may agree, to wit: the appellee, William Montgomery, for wood used by the said William Warren during the season of 1887, and to John Fanning and William Jones each \$15; John Carpenter near \$50; Sam Johns for wood used of him in 1888, and George Grisman the amount of arrears due him in 1888; to Wirt Moore \$26; the said William Warren agreeing to furnish a warranty deed to appellant for five acres of land situated near the residence of Frank Strate, about one half mile south of Woodland; which contract was duly signed by appellant and William Warren.

The bill alleges fraud or mistake of appellant or John Will Anderson, or fraudulent alteration after the execution of the contract, in that it does not provide for the payment of appellee's claim for wood furnished Warren in 1888; that

Anderson v. Montgomery.

afterward, on November 30, 1889, appellee recovered a judgment against Warren on account of the said wood sold in 1888, for \$149.46; that execution issued January 16, 1890, and returned January 18, 1890, no part satisfied; that appellee had made demand on appellant for payment of wood furnished in 1888, which was refused. Appellant and Anderson answer, admitting the contract, but denying that there was any mistake or fraud in its execution, or that it was afterward changed, and deny that they were jointly or individually indebted to Warren.

It is insisted that the court had no equity jurisdiction as against the appellant to correct this kind of mistake where the contract was between other parties, whether for the benefit of appellee or not. We think this point of objection can not be raised in this court or in the court below, for the reason that the bill was neither demurred to nor any objection raised to the equitable jurisdiction of the court in the answer. The parties submitted themselves to the jurisdiction of the court and they have no right now to complain. *Crawford v. Schmitz*, 139 Ill. 564.

We have, however, examined the evidence carefully, and are of the opinion that upon a fair view of it all, the decree is not sustained by it. We need not go into particulars, as the case will have to be examined anew and new evidence may be supplied. It is sufficient to say, however, that the evidence lacks that decree of certainty where a written instrument is proposed to be altered or changed by parol. The decree is reversed and the cause remanded, with leave to either party to take new evidence, and especially to appellee, if he or they be so advised.

Decree reversed and cause remanded.

ELIAS LYMAN

V.

JANE OTLEY.

Real Property—Contract for Sale of.

This court affirms the judgment for the plaintiff in an action brought under an alleged contract for the sale of real estate, the evidence being conflicting, and the instructions without error.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Henry County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. CHARLES C. WILSON and WILLIAM LAWSON, for appellant.

Messrs. DUNHAM & FOSTER, for appellee.

MR. JUSTICE HARKER. Appellant foreclosed three mortgages which he held upon a farm of 400 acres situated in Bureau and Henry counties belonging to George Otley. At the foreclosure sale he became the purchaser. Otley was at the time living upon the premises with his family. Appellant then entered into a written contract with appellee, the wife of George Otley, whereby he agreed to convey to her the land upon payment of \$24,713.23, the total amount then due him, \$2,000 of which was to be paid in cash and the balance in ten years, with interest at the rate of eight per cent, payable annually. The date of this contract was January 13, 1884. The cash payment of \$2,000 was made and the Otleys continued to reside upon the place. Full payments of annual interest on the deferred payment were promptly made as they fell due until 1889, when appellee began falling behind in her payments and continued to pay but a portion of the interest as it fell due.

Lyman v. Otley.

Early in April, 1890, the contract was surrendered and a one-year's lease executed to appellee and her two sons, payments of rent to be made partly in grain and partly in cash.

Appellee claimed that at the time she leased the premises appellant agreed that if she would find purchasers for the farm within the term of the lease he would allow her all over the sum of \$25,580.81, for which she could sell the farm. She caused the land to be advertised for sale in several newspapers, and she and her sons made considerable effort to secure purchasers. Shortly before the expiration of the lease a purchaser was found for the 160 acres in Bureau county at \$68 per acre and purchasers for the 240 acres in Henry county at \$65 per acre. She claims that appellant was notified of the proposed purchases and requested to execute a deed to them, which he refused to do.

In a suit upon the alleged contract appellee recovered a judgment for \$800. Upon the grounds that the verdict is against the evidence, that the court gave improper instructions and refused others that were proper, appellant seeks a reversal.

It must be conceded that to entitle appellee to recover it devolved upon her to show by a preponderance of the evidence, first, that there was a contract between the parties for her to sell the land; second, that she sold it according to the terms of the contract; third, that she notified him of the sale and that he refused to convey.

That there was such a contract she testified positively. That purchasers were procured, that appellant was notified and applied to for a deed, and that he refused to convey, two of appellee's sons testified. Appellant contradicted appellee, testifying positively that there was no agreement for her to sell. He also contradicted the two sons as to their testimony that he was applied to for a deed and refused to convey. He was corroborated by Ira Blake, his agent, in his denial of a contract for appellee to sell. At the time when appellee claims the contract was first spoken of and its terms substantially settled upon, the only persons

present were herself, appellant and Blake. Appellee and her two sons testified that a few days afterward, when the lease was drafted and delivered, the terms of the contract authorizing her to sell were rehearsed and assented to by Blake. They were contradicted by Blake and a witness who drafted the lease. Although appellant claimed that Blake had no authority to agree to or make any terms authorizing appellee to sell, appellee testified that appellant told her that when she transacted business with Blake, it was all right; that he was authorized to act for him, and whatever he did would be satisfactory. If such statement was made to her, then any agreement made by Blake on the day the lease was executed in furtherance of any previous proposition or understanding for her to sell, within the terms of the lease, was binding on appellant.

It is impossible to reconcile the testimony of the parties and the witnesses introduced to sustain them. The case is one falling peculiarly within the province of a jury. We can not say they reached an improper conclusion.

The second and third instruction given for appellee are not open to the criticism that they are misleading and assume as facts matters in dispute. The court committed no error in refusing instructions offered by appellant. The refused ones which announced correct principles of law and were applicable to the case were sufficiently covered by others.

Perceiving no error in the record, the judgment will be affirmed.

Judgment affirmed.

GEORGE H. MARTIN ET AL.

V.

ROBERT DUNCAN.

Fraudulent Sales—Stock of Goods.

In the case presented, this court holds, in view of the evidence, that a certain stock of goods was not sold to a third person with the fraudulent

47	84
156s	274
47	84
79	587

Martin v. Duncan.

intent to hinder and delay creditors of the seller, and that the change of possession thereof was sufficient.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of La Salle County; the Hon. GEORGE W. STIPP, Judge, presiding.

MESSRS. SMITH, HELMER & MOULTON, RECTOR C. HITT and A. T. LARDIN, for appellants.

MESSRS. SAMUEL RICHOLSON, M. T. MOLONEY and WILLIAM L. SEELEY, for appellee.

MR. JUSTICE HARKER. Appellants, creditors of one George W. Duncan, sued out a writ of attachment from the Circuit Court, and had it levied upon a stock of goods in the possession of appellee, Robert Duncan. Appellee interpleaded, claiming the goods by virtue of a bill of sale from George W. Duncan. A trial was had upon the issues raised by a traverse of the interpleader, which resulted in a verdict and judgment for appellee. Appellants seek a reversal of the judgment because, first, the alleged transfer of the stock of goods from George W. Duncan to Robert Duncan was entered into with fraudulent intent, to hinder and delay creditors; and, second, there was such absence of change of possession as rendered void the alleged conveyance so far as concerned creditors of George W. Duncan.

The testimony was confined almost entirely to that of appellee. It shows that in 1885 he loaned George W. Duncan \$436; that he subsequently loaned him different sums, amounting to \$554; that he also loaned him of his wife's money \$380.95; that he entered his services as a clerk in his store at Ottawa, and that there was due him for wages in May, 1891, \$850. It also appears from the evidence that appellee had charge of the store at Ottawa, his brother, George W. Duncan, not being a resident of the place. Being urged by his wife, he pressed his brother for a settlement and security for the money loaned and due him as wages.

This resulted in the execution of the bill of sale and a transfer of the stock of goods to appellee. We see nothing unreasonable in the testimony of appellee, and nothing in the record to warrant the conclusion that the transfer was made for the purpose of hindering and defrauding the creditors of George W. Duncan. He seems to have acted in the utmost good faith and with the sole purpose of securing the debts due him and his wife. This he had a right to do, although he knew at the time it would leave other creditors without property out of which to satisfy their claims.

Under the circumstances no great visible and actual change of possession was necessary. Appellee had for months been in sole control and management of the store, as the agent of his brother. After the purchase he took possession of the goods as owner which he had really had possession of as agent. There may have been no visible change to one unacquainted with the facts as far as his manual possession of goods was concerned. He changed the advertisements of the goods, notified the owner of the building where the goods were kept of his purchase, became his tenant by agreement, advertised the goods in his own name and refused to receive goods which had been shipped to George W. Duncan. In addition thereto appellants had actual notice of the sale and transfer of the goods before the levy of their attachment.

It is objected that appellants should have shown their right to attach the goods. The evidence to show indebtedness to appellants was excluded upon the objection of appellee, and he can not now claim that it was not made. But we think the interpleader and traverse thereto raised no issue but the title of appellee to the goods levied upon, and that it was incumbent upon him to show by a preponderance of the evidence his rightful ownership in them. If he recovered it was necessarily upon the strength of his own title.

Objections are urged to several of the instructions. They are in the main correct. But we are so well satisfied with the finding of the jury that we deem it unnecessary to consider them at length in this opinion.

The judgment will be affirmed. *Judgment affirmed.*

JANE MCGRAW AND ELMINA WILCOX

V.

ISRAEL R. PATTERSON, EXECUTOR.

Trover—Evidence—Instructions—Bailments.

1. In an action of trover for the alleged wrongful conversion of certain personal property, the fact being that defendants were the holders of a promissory note given by a person, since deceased, who had also, to secure the same, given a bill of sale of certain property, the contention being that the property demanded was not included therein, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

2. A list of the goods demanded, with price opposite each item, the same being used by the officer who made a demand therefor, should not be allowed to go to the jury, even with the caution not to regard such prices, there being a likelihood that they will be influenced thereby, notwithstanding such caution.

3. This court holds that a recovery was properly had for goods held to be sold upon commission,

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge, presiding.

Messrs. MORRISON & WOOSTER, for appellants.

Messrs. S. B. POOL and SHERWOOD DIXON, for appellee.

MR. JUSTICE CARTWRIGHT. Nellie Butler commenced this suit in trover against appellants, Jane McGraw and Elmina Wilcox, for the wrongful conversion of certain personal property in and about a millinery and dress-making establishment formerly occupied by plaintiff. Before the trial at which the judgment appealed from was entered, the plaintiff died, and appellee, her executor, was substituted as plaintiff. There was a verdict for appellee for \$691.50, on which judgment was entered.

The facts proved on the trial were briefly as follows:

Mrs. Nellie Butler was carrying on the business of millinery and dress-making, the millinery business being conducted in the front room and the dress-making in the rear room of a store building, and she lived in the basement of the same building. Appellants held a note made by her to Mrs. Snow and transferred to them, dated June 3, 1890, for \$500 and interest; and on January 3, 1891, Mrs. Butler executed a bill of sale to appellants, the object of which was to secure payment of that note. Mrs. Butler was then sick in bed in the basement, and Martha Burns, a clerk, was called down from the rooms where the business was carried on and directed to take possession of the property conveyed, and to keep an account of the business done and report the same to appellants. The property conveyed by Mrs. Butler as security by the bill of sale was "the store furniture and fixtures located in the store room occupied by her as a millinery store and belonging to Mrs. James McGraw, together with her stock of millinery goods, consisting principally of ribbons, velvets, plumes, hats, caps, fancy work and embroidery silks, located in the above described store room." Martha Burns took possession of the property in the rooms where the business was conducted and ran the millinery store until February 14, 1891, when the receipts had amounted to \$71.10, and she had paid out in expenses \$70.89. Appellants then closed the store and kept it closed until the last week of April, 1891, when it was again opened in charge of Julia Culler. Before the commencement of this suit Mrs. Butler demanded from appellants the articles of personal property now in question, of which they obtained possession when they took possession of the store, and which it is contended on behalf of her executor, were not included in the property transferred by the bill of sale. Appellants failed and refused to surrender the articles so demanded, and the questions in this case are whether the property demanded was included in the bill of sale so as to entitle appellants to retain possession of it, and if any of it was not included, whether the value of such property not included was sufficient to sustain the verdict rendered.

As to the first question it is clear that many of the articles in question were not embraced in the terms of the bill of sale, not being store furniture or fixtures, and having no relation to the manufacture or sale of hats, bonnets, head dresses or other articles for dressing or ornamenting the head which could come within the common understanding of the term millinery goods, or any other term used in the bill of sale. Some of them were for use in the dressmaking business and others for domestic or personal use, and there were corsets, children's clothing, oil paintings, a crazy quilt not exposed for sale as any part of the stock, cloaks for sale on commission and the like. Some of this property was kept in the store and work room upstairs on account of the dampness of the basement where the family lived. It is claimed, however, that appellee could not recover the value of the cloaks which were for sale on commission. The cloaks were delivered by Mrs. Snow to Mrs. Butler for sale, and appellants offered the cloaks to Mrs. Snow, who did not receive them and had no right to their possession. She told appellants that she would send them to another milliner, Mrs. Gossip, for sale, but that they had been given to Mrs. Butler for sale and that Mrs. Butler would not release them. The bailee had a right to recover their value so as to be ready to answer to the bailor, Mrs. Snow. Dicey on Parties to Actions, 353; Benjamin v. Stremple, 13 Ill. 467; P. P. & J. R. R. Co. v. McIntire, 39 Ill. 298; Hutton v. Arnett, 51 Ill. 198.

The remaining question, whether the property not in the bill of sale, to which Mrs. Butler was entitled, was of sufficient value to sustain the verdict, is one on which it is not easy to reach a satisfactory conclusion from the record. The court admitted in evidence a written list of articles used by a constable when he made a demand of appellants, and opposite each article a value was set down according to appellee's theory of value.

The court instructed the jury not to give any attention to the values, but to use the paper only for a description of the property. The amounts had nothing to do with the demand, and the paper should not have been admitted with the prices

attached, even with the direction to not regard them; for what is placed before the eye will be seen in spite of such direction. There was competent evidence of values amounting to about \$170 more than the verdict, but some of the articles testified about and enumerated on the paper introduced were fairly embraced within the terms of the bill of sale, and there was controversy as to the value of others. After eliminating those articles which were embraced in the bill of sale there was evidence of values sufficient to sustain the verdict if taken as correct. There were eight oil paintings, and the testimony for appellee was that they were valuable; one worth \$50 to \$75, others worth \$25 to \$35, and others from \$5 to \$20. On the other hand there was testimony that they were amateur work, of a very poor sort; that the largest was worth \$2.50, the next three \$2 each, and the remainder fifty cents each. Some of the articles seem to be such as accumulate about every house, which have no certain value and which may be regarded as valuable or as trash. The difficulty in reaching a conclusion as to values from a reading of the record will be readily seen, and although it might seem to us that the values allowed were high, yet we would not feel justified, on that account merely, in setting aside the judgment of the jury and the trial judge who approved the verdict, where there is testimony to support it. They had better opportunities of determining the credit to be given to estimates given by witnesses than we have, and their judgment should not be lightly set aside. We do not think that the admission of the paper with the values should work a reversal, the values being the same as fixed by other and competent testimony.

Appellee assigns as a cross-error that he was not permitted to recover for the property transferred by the bill of sale. There was evidence tending to prove that appellants claimed to hold it for more than it was pledged to secure, but there was no tender of the amount actually due and nothing was done to dispense with it. The action of the court on that subject was right.

The judgment will be affirmed.

Judgment affirmed.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY
V.
ANNA E. ANDERSON, ADMINISTRATRIX.

47	91
54	308
47	91
154	432

Railroads—Negligence—Personal Injuries—Crossings—Signals—Obstructions to view—Contributory Negligence—Evidence.

1. Testimony as to the general habits of deceased as to care and caution, is admissible in a personal injury case only where no witness was present at the time of an accident, and the exact manner in which the death occurred can not be made to appear to the jury.

2. In the case presented, this court holds, in view of the evidence, that deceased met his death through his own negligence.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Ogle County; the Hon. JAMES SHAW, Judge, presiding.

Messrs. J. C. SEYSTER and J. B. STEPHENS, for appellant.

Messrs. BAXTER & GARDNER and O'BRIEN & O'BRIEN, for appellee.

MR. JUSTICE HARKER. This was an action by appellee to recover for the killing of Abram S. Anderson, by a train of cars on appellant's road, while he was attempting to cross the railroad track with his sled and team at a highway crossing. The negligence charged in the declaration was, first, negligent management of the train; second, failure to ring bell or sound whistle; third, allowing obstruction to remain on the right of way so as to prevent one from seeing an approaching train; fourth, failure to keep a flag-man at the crossing. There was a recovery for \$2,000.

The evidence shows that the deceased was killed at a point where the Meridian Road crosses appellant's railroad, near the station of Stillman Valley. It was a very cold day in January, 1888. Deceased was riding in a bob-sled drawn by two horses, on one of which was a string of bells. He was closely wrapped in fur overcoat, muffler, etc., and when

seen, but a few rods from the track, was seated in his sled with the front of his body and face turned in the direction opposite to that from which the train was approaching. Had he looked for a train coming from the west he could have seen the one which collided with him in ample time to stop his team and avoid the accident. He could have seen the train approaching when he was fifty-five feet from the track.

There was a conflict in the evidence as to whether the bell on the engine was rung continuously for eighty rods before reaching the crossing; but we think the preponderance shows that it was. It does not appear from the evidence that the engineer could have so managed his engine as to avoid the accident, or that there was any negligence in the manner in which the train was being operated.

No such duty rested upon appellant as to keep a flagman at the crossing where Anderson was killed.

To entitle the plaintiff to recover it was incumbent on her to show, by a preponderance of the evidence, that the deceased was, at the time of the accident, in the exercise of ordinary care for his own safety. Instead of that fact appearing from the evidence the contrary appears. Doubtless the testimony showing the general habits of the deceased as to care and caution had great influence with the jury.

We understand that such evidence is proper only in a case where no witness was present at the time of the accident and the exact manner in which the deceased met his death can not be made to appear to the jury. *C., R. I. & P. Ry. Co. v. Clark*, 108 Ill. 113. In this case the evidence should have been excluded or its effect guarded against by an appropriate instruction.

The fourth instruction given for the appellee was confusing; it invaded the province of the jury and doubtless worked prejudice to the appellant.

The judgment should be reversed and the cause remanded.

Reversed and remanded.

CARTWRIGHT, P. J., took no part in the decision of this case.

Edwin v. Jacobson.

JULIUS T. EDWIN

V.

NATHAN JACOBSON AND SAMUEL LUDWINOSKI.

47	93
73	408

Replevin—Contract of Sale.

1. Upon a suit in replevin brought for a certain stock of goods, plaintiff contending that defendant held the same under an arrangement amounting to a mortgage, defendant maintaining that the transaction was an absolute sale, this court holds, there being no evidence of a tender to defendant of the amount due him, that the judgment for the defendant can not be disturbed.

2. To enforce such contract, if shown, the remedy would be in equity.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Bureau County; the Hon. GEORGE W. STIPP, Judge, presiding.

Mr. J. L. MURPHY, for appellant.

Mr. A. R. GREENWOOD, for appellees.

MR. JUSTICE LACEY. This was a suit in replevin by appellant to recover a stock of goods situated in a store in Spring Valley, of which appellees had possession, Jacobson claiming ownership and Ludwinoski being his agent.

The appellee Jacobson claimed to own the goods by virtue of a purchase from appellant for \$310, for which he introduced in evidence an absolute bill of sale, under which he claimed to take possession of the goods and store building, which was rented from a third party by appellant before the reputed sale. Appellant insisted and so testified before the jury that it was not a *bona fide* purchase by Jacobson, but insists that it was a bill of sale in form only, and intended as a mortgage for the money borrowed, \$310, and that Jacobson was to loan him the \$310 and take possession

of the store and conduct it for him and sell goods for three months, at thirty dollars per month, and that at the end of three months appellant was to pay Jacobson the money borrowed and the wages, amounting to \$400; and at the time of the execution of the bill of sale it was agreed that appellant should have a defeasance back from Jacobson showing the real transaction, which, as he contends, was prevented by all parties and their attorney, Weil, who drew the bill of sale, having to go to dinner after completing it and before the defeasance was made out.

The appellee Jacobson contradicts this claim in his evidence flatly, and is supported somewhat by Weil, who remembered nothing of any agreement for a defeasance. Several other witnesses were introduced on either side. The evidence, however, as a whole, was conflicting, the preponderance being strongly in favor of an absolute sale of the goods to Jacobson. There is another point in the case that seems conclusive against the right of appellant to recover in the action. If he desired to cancel the sale and reclaim the goods it was his duty to pay back to Jacobson the money which he had borrowed, at least. He would be required to put him in *statu quo*.

The evidence entirely fails to show that the appellant made a tender of this money, or any part of it, to Jacobson, before the commencement of the action or at any time after. It is insisted that Jacobson sold enough of the goods and realized sufficient money out of them to repay him a considerable portion of the money loaned. This claim, however, is not sustained by the evidence. It rather tended to show that Jacobson sold no more than enough to pay him the expenses of conducting the store and his own wages up to the time of the commencement of the replevin suit. There was no portion of the money borrowed tendered to Jacobson and there is no claim he sold goods enough to pay the entire amount loaned. The only theory upon which this replevin suit could be maintained, even on the insistence of appellant, would be on a rescission of the contract claimed to have been made by appellant. According to this sup-

Rackley v. Rackley.

posed contract Jacobson was to hold possession of the goods as a mortgagee, having the entire right to dispose of them for the benefit of his own claim for money loaned, and wages. If such contract be treated as in force there would be no right of possession of the goods in appellant, and, as before stated, if the latter choose to rescind the contract he must repay the money borrowed. If appellant desired to enforce the specific contract which he claimed to exist, his remedy would be in equity. There are quite a number of points raised by appellant as to the action of the court on the trial of the case and of the form of the verdict and judgment claimed to be error, none of which are tenable.

The fact that the jury failed to assess damages against appellant for the wrongful taking and retention of the goods, and that the court assessed one cent damages against him, is an irregularity that could work no injury to appellant, as he pays no material damages. Irregularities and errors, if any, committed on the trial, could make no material difference in the case, as on the undisputed evidence the appellant had no right to recover.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

NATHAN F. RACKLEY

V.

NATHAN RACKLEY.

47 95
151s 332

Injunction—Negotiable Instruments—Gift.

In a controversy in which was involved the one point, whether or not a certain mortgage and notes were assigned and delivered as a gift, or for collection, this court declines, in view of the evidence, to interfere with the decree taking the latter view.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Bureau County; the
HON. GEORGE W. STIPP, Judge, presiding.

Mr. RICHARD M. SKINNER, for appellant.

Messrs. ECKELS & KYLE, for appellee.

MR. JUSTICE CARTWRIGHT. The controversy in this case is concerning the ownership of a series of notes and a mortgage securing the same, made by Nathan E. Morris, a grandson of the appellee, Nathan Rackley, payable to appellee, and by him assigned by indorsement thereon to appellant, and delivered to appellant, Nathan F. Rackley. Appellee filed his bill against said Nathan E. Morris and appellant, alleging that said notes and mortgage were assigned to appellant for collection only, and praying for a restoration of the same to him and for an injunction restraining appellant from selling or negotiating them. Nathan E. Morris was defaulted, and appellant answered the bill, claiming that the notes and mortgage were assigned and delivered to him as a gift. Replication to said answer being filed, there was a hearing, and a decree was entered granting the relief prayed for in the bill. No question of law is raised by the appeal. The parties are agreed as to the conditions requisite to constitute a valid gift, and the only dispute is concerning the facts.

The hearing was by the examination of witnesses in open court, where they were all seen and heard. The decision of the case depended upon the credibility of the witnesses examined and the weight to be given to their testimony, and much weight is therefore given to the findings of the chancellor, who had better opportunities for arriving at a correct conclusion as to the facts than we have. Appellee is ninety-two years old, and appellant, who is his son, is about sixty-five years of age. Appellee and his aged wife were boarding with appellant at the time of the assignment, April 10, 1890, and were to pay for their board at the rate of \$500 per year. The father and son contradicted each other flatly as to whether the notes were assigned for collection or as a gift. The evidence of appellee shows the infirmity of memory as to details usually incident to great age, but

Rackley v. Rackley.

we can not see that he is entitled to any less credit as to the principal fact than appellant. There was some evidence that the relations between appellee and his grandson, the maker of the notes and mortgage, were not pleasant, and Dr. Hopkins, who witnessed the signature to the assignment of the mortgage, testified that appellee then said that the young man would find out now that a man had got hold of it who would make him pay. Harvey M. Trimble, the attorney who wrote the indorsements and assignment by which the transfer was made, testified that appellant came to him with the notes bearing indorsements to bearer, and was told that that was not a judicious way to make the indorsements; that appellant told him that appellee had trouble with his grandson, the maker of the notes, and wanted appellant to collect them for him; that witness said that all that was necessary was an indorsement for collection; that appellant objected to such an indorsement and said that he was to have his pay for the board out of the paper; that witness then said that the best way would be to make the indorsement in the ordinary way, and for appellant to give his father a receipt, showing how he held the paper; and that witness wrote the indorsements and assignment to be signed by appellee, and wrote and gave to appellant a receipt for the notes and mortgage to be signed by him, specifying that they were received to be collected, and that out of the proceeds appellant should have the right to take pay for the board and should pay the balance over to appellee.

Appellant denied this conversation with Mr. Trimble and the making of the receipt for him to sign, and testified that when the notes and mortgage were given to him he questioned the form of the indorsements to bearer, and went to Mr. Trimble to consult with him about it at the suggestion of appellee. He further testified that appellee had given property to his other son, George Rackley, and to his daughter, Phoebe Morris, and told him that this gift was not as much as he had given to George and Phoebe, but that he would make it all right before he died. A son and daughter of

appellant testified to conversations with appellee in which he said that he had given the notes to their father as a present, and these conversations were denied by appellee. David D. Bailey, a justice of the peace who wrote the first indorsements to bearer, which were afterward erased, testified that appellee then said that he was going to give the notes to appellant and that appellant did not know anything about it.

It appears to us that the evidence of the disinterested witnesses preponderated in favor of the claim of appellee. No circumstance having a decided bearing in the case was proven. We are satisfied that the decree was supported by the evidence, and it will be affirmed.

Decree affirmed.

SAMUEL BOWLES

V.

JERMAN S. KEATOR ET AL.

Negotiable Instruments—Notes—Limitations—Sec. 16, Chap. 83, R. S.

1. One of the rules of interpretation of a new statute is to consider the evils intended to be remedied by its enactment and the remedy sought, and to construe it in such light.

2. The requirement set forth in Sec. 16, Chap. 83, R. S., that the payment or new promise shall be "in writing," does not apply so far as to require the evidence of it to be so preserved, and the words "in writing" have reference alone to the specified new promise to pay.

3. In case part payment is alleged, the trial court should admit all evidence, written or verbal, which tends to establish payment. It is not necessary that any writings to establish or prove such facts be signed by any one, so that they are evidence of transactions actually taking place between the parties, and made at the time or by the consent of the parties to be charged.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Rock Island County;
the Hon. JOHN J. GLENN, Judge, presiding.

47	98
55	134
47	98
68	120

Bowles v. Keator.

Mr. HENRY CURTIS, for appellant.

MESSRS. SWEENEY & WALKER, for appellees.

MR. JUSTICE LACEY. This was an action by appellant in assumpsit on two promissory notes given by appellees, each for \$2,000, dated January 1, 1880, payable to appellant in five and six months thereafter, respectively.

The declaration also contained consolidated money counts and to these appellees pleaded the general issue and the statute of limitations of ten and five years.

To the plea of limitation of ten years, the appellant replied, divers payments within ten years next preceding the commencement of the action were made on the said notes in writing by appellees to appellant; also that such payments were evidenced by the writing of the said appellees. As to the plea of five years limitation, appellant replied, payments within five years of the commencement of the action. To replications seventy-six to eighty-seven and one hundred and twenty-four to one hundred and thirty-five inclusive, to the plea of ten years limitations, in which appellant set up that at divers times after action had accrued and within ten years next prior to the commencement of the action appellees made divers payments to appellant on said notes without averring that the evidence of such payments was preserved in writing, the court sustained the demurrer.

It will be noticed there was a great dearth of replications, only one hundred and seventy-one having been filed.

By the statute of limitations the notes on their face were barred, having run more than ten years from the time they became due. In order to show a revival of the notes by payment, the appellant offered evidence in connection with the indorsements of payments on the back of the notes, tending to prove that such indorsements thereon were authorized by appellees; hence the notes were taken out of the statute of limitations, being within ten years from the bringing of the action, and in writing. But the court excluded all such evidence, holding, as we suppose, that by

the statute, the indorsements or acknowledgment or promise to pay must have been in writing, signed by the appellees.

The proof, if admitted, would have been sufficient of payments made in writing on the notes without the requirement of being signed by appellees, to have arrested the running of the statute of limitations. In the rejection of this evidence, we think the court was in error.

Sec. 16 of Chap. 83, R. S., is as follows: "Action on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing shall be commenced within ten years next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after such payment or promise to pay."

It is contended by counsel for appellant that the requirement in the above section, that the payment or new promise shall be "in writing," does not apply so far as to require the evidence of it to be so preserved, and that the words "in writing" have reference alone to the specified "new promise to pay;" that where there is a new promise to pay a note, for instance, without other consideration than contained in the original obligation, such promise, to be effectual to revive the note, must, by the terms of the statute, be in writing, but does not refer to payments, or make any such requirement as to them. If this view of the statute in question be correct, then the court erred in sustaining the demurrer to those replications averring payments on the notes sufficient to revive them, unless the evidence of such payments must have been preserved in writing, such later allegation being omitted.

The question is not free from difficulties, but after a careful examination of the section in question and such authorities as appear to have any application, we are inclined to think that the appellant's views of the meaning of the section are correct. It would be a very awkward and meaningless ex-

Bowles v. Keator.

pression to say that a payment must be preserved in writing. The evidences of things are only preserved in writing and not acts themselves. On the other hand, a promise to pay may be made in writing, and this the statute plainly requires, in language suitable and appropriate to the purpose.

If the legislature had intended to require the evidence of a payment to have been reduced to writing in order to have the effect of reviving the action, it could and we think would have used language conveying that idea with reasonable clearness; besides, we think the plainer and more reasonable reading of the section would apply the words, "in writing" as only qualifying the words "new promise," and not the word "payment."

One of the rules of interpretation of a new statute is to consider the evils intended to be remedied by its enactment, and the remedy sought, and to construe it in such light. It is according to common experience that if the revival of a note and other obligation may rest in a verbal promise the result of the issue is uncertain. The frailty of human memory and the self-interest of parties may cause the witness to misinterpret conversations and color his evidence to suit the side he desires to win, resulting often in establishing a promise where none was in fact made or intended by the payor or obligor. And then it seems in a high degree appropriate and proper to require the renewal and extension of a written claim to be effected by as high a grade of evidence as the original.

In 1863 the Supreme Court of this State had held, against the contention of the appellant in a suit, that a verbal promise by the maker was sufficient to revive a note or other written instruments already barred by the statute of limitations; in fact, that such a new promise must be regarded in theory the same as a re-delivery of the note by the maker to the payee or holder. *Sennott v. Horner*, 30 Ill. 429. This was the evil intended to be corrected by the legislature by the passage of the act in question.

As to payment, there was no such necessity, or danger in allowing the law to stand as it had been established for many years. It was something tangible, and less liable to be falsified where the fact did not exist. Hence the statute was left, as to it, as the law stood before its passage. The law was simply re-enacted by the legislature.

The demurrer, therefore, to the replications in question was improperly sustained.

The other contention of appellee, that the writing must also be on the note in order to make it effectual, we need not pass upon, as we hold that no writing at all is required.

The court below should admit all evidence, written or verbal, which legally tends to establish the payments on the notes. And it is not necessary that any writings to establish or prove such facts need be signed by any one, so that they are evidence of transactions actually taking place between the parties and made at the time or by consent of the parties to be charged.

For these errors the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

47 102
151s 566

ARTHUR KEITHLEY

v.

CHAUNCEY C. WOOD ET AL.

Mortgages—Redemption—Conditional Sale.

1. A deed absolute on its face, if intended by the parties as security for a debt, is a mortgage, with right in the grantor to redeem.

2. Where, in a given case, it is doubtful whether a given transaction was a mortgage or a conditional sale, it should be held to be a mortgage.

3. If it does not appear in a given case tried before a chancellor, what his ruling was as to the admissibility of certain evidence, it will be presumed that in reaching his conclusions upon the merits, he rejected

Keithley v. Wood.

such testimony as was incompetent, and considered only such as was competent.

4. If it appears from the record in a given case that the chancellor received and considered incompetent testimony, this court sitting in review will consider all the proofs, and if after rejecting such as should have been ruled out by the court below there remains sufficient to support the decree and show that it is right, the decree will be affirmed.

5. In the case presented, this court holds that the transaction in question was a mortgage, not a sale; that while the testimony of complainant's wife was improperly received, the facts and circumstances surrounding the transaction, considered in connection with the conflicting testimony of the parties to the suit, justify the above conclusion, and that the trial court correctly decreed that the greater part of the costs be paid by appellant, because they were made by the wrongful refusal of appellant to acknowledge complainant's rights.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Mr. JAMES A. CAMERON, for appellant.

Messrs. JACK & TICHENOR and I. C. EDWARDS, for appellees.

MR. JUSTICE HARKER. On the 1st of November, 1889, Chauncey C. Wood and Kate Wood, his wife, executed and delivered to appellant a warranty deed for one hundred and twenty acres of land situated in Peoria County.

At the same time appellant executed and delivered back to Wood a written agreement to reconvey to Wood an undivided one-seventh interest in the land on condition that Wood pay to him by the 31st of December, 1889, \$937.50. Wood was at the time the owner of but an undivided one-seventh interest in the land. Payment was not made at the time specified in the agreement, and appellant indorsed on the back of it an extension until the 10th of January, 1890. Payment was not made within the time of extension.

Subsequently the property increased in value and appellant declined to reconvey upon the ground that the time for buying it back had expired.

Appellees, claiming that the deed executed by them and the written instrument executed by appellant constituted a mortgage, filed their bill in equity to redeem. An answer was interposed denying that the transaction was a mortgage or intended as such, but claiming that it was a sale to Keithley with the privilege to Wood of repurchasing within a certain time.

The cause was referred to the master, who, after taking the proofs, found the equities with the complainants, and reported a recommendation that the deed and contract be decreed a mortgage. The Circuit Court entered a decree in accordance with the master's report, and allowed Wood to redeem on payment of \$1,021.90, and interest at rate of five per cent from June 30, 1891.

The question in controversy is whether the transaction was a conditional sale, as contended by appellant, or a mortgage, as contended by appellees.

The rule is so well settled that a deed absolute on its face, if intended by the parties as security for a debt, is a mortgage with right in the grantor to redeem, that a citation of authorities is unnecessary.

An examination of the authorities will show that courts of last resort have frequently encountered embarrassment in discriminating between mortgages of this class and conditional sales. The embarrassment has usually arisen because of a misapprehension of the law by the parties, or a design upon the part of one of the parties to conceal the real purpose of the transaction has clothed the transaction with some of the incidents of a mortgage and some of the incidents of a conditional sale. We think the decided weight of authority is that in doubtful cases the transaction should be held a mortgage. Jones on Mortgages, Sec. 279; Russell v. Southard, 12 Howard, 139; Cornell v. Hall, 22 Mich. 377; Rich v. Doane, 35 Vt. 125.

There is manifest wisdom in such holding. By it the ends of justice are more apt to be attained and fraud and apprehension less likely to succeed. In such transactions the creditor has the advantage. The debtor is the weaker

Keithley v. Wood.

party and needs the protection which courts of equity are capable of granting.

In addition to the deed and written agreement to reconvey, the proofs concerning the transaction, as taken by the master in chancery, were confined almost entirely to the testimony of Wood, his wife and Keithley. The testimony of Wood and his wife is positive that the deed was executed merely to secure Keithley in his debt; that it was not their intention to sell the property and that it was the understanding and agreement between them and Keithley that the conveyance was to be regarded in the light of a mortgage. They are directly contradicted by Keithley.

Objection was made in the Circuit Court to the competency of Mrs. Wood as a witness and it is assigned for error that the court held she was competent and considered her testimony. It does not appear from the record what holding the court made, if any, upon the question. We are of the opinion that she was not a competent witness. *Smith v. Long*, 106 Ill. 485. Whether the court ruled correctly upon that question, however, we do not regard as material. If it does not appear that any ruling was made upon the objection it will be presumed that the chancellor, in reaching his conclusions upon the merits, rejected such testimony as was incompetent, and considered only such as was competent.

If it appears from the record that the chancellor received and considered incompetent testimony, then will this court sitting in review consider all the proofs; and if after rejecting such as should have been ruled out by the court below there remains sufficient to support the decree, and show that it is right, the decree will be affirmed. *Flaherty v. McCormick et al.*, 123 Ill. 525.

Rejecting the testimony of Mrs. Wood, we are of the opinion that the facts and circumstances surrounding the transaction, considered in connection with the conflicting testimony of Wood and Keithley, justify the conclusion that the transaction was a mortgage.

We do not attach much importance to the statement of Wood made to his brother and brother-in-law, that he had

sold the property, for the reason that when made he was under the influence of liquor.

The court correctly decreed that the greater part of the costs be paid by appellant, because they were made by the wrongful refusal of appellant to acknowledge appellees' rights. *Hollingsworth v. Koon*, 117 Ill. 511; *Price v. Blackmore*, 65 Ill. 386.

Decree affirmed.

47 106
149s 899

CITY OF AURORA

v.

WILLIAM ROCKABRAND.

Municipal Corporations—Defective Highways—Personal Injuries—Pile of Gravel in Highway.

1. Whether or not the leaving of a gravel pile in a street over night did not render the same unreasonably unsafe for travelers, and whether or not such street was well lighted upon the night of an accident, are, in a given case, questions of fact for the determination of the jury.

2. In an action brought to recover from a municipality for personal injuries suffered through the overturning of plaintiff's wagon in the night time by reason of a pile of gravel being left upon a highway, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed May 23, 1893.]

APPEAL from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding.

MESSRS. CHARLES WHEATON and C. I. McNETT, for appellant.

MESSRS. ALSCHULER & MURPHY, for appellee.

MR. JUSTICE LACEY. This was a suit by appellee against appellant to recover for injuries received by him in having his

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peddling wagon, drawn by horses, turned over on the streets of the city while he was driving along, by which he received such injuries to one foot that destroys the use of it and his leg permanently, and affects his nervous system in such a way that he has lost the use of his sight by disease of the optic nerve. The disease caused by the injury is progressive and will probably cause the death of appellee in a few years at most. He is a physical wreck.

The trial resulted in a verdict and judgment for \$5,000, and on the trial before, the verdict was for \$6,000, which was set aside on account of the death of the judge who tried it, before judgment was rendered.

The negligence of appellant charged in the declaration was in piling up gravel on the street from two to three feet high, leaving it in that condition over night so that when appellee was driving along he, without negligence, ran onto it and upset his wagon and was thrown out and injured in the manner above stated; a bar of iron with which the wagon was loaded falling on him and doing the injury.

It is strenuously urged that the city was guilty of no negligence. It is insisted that the gravel banks left in the street were not unreasonably unsafe for travelers going along in the condition of appellee, even in the night time, when the accident occurred, and that the street was well lighted.

These, however, were questions of fact for the jury, and it has decided them against the contention of appellant. The accident took place near the junction of North avenue and Jackson street, a little west of Jackson street. The city authorities had been, on the day of the accident, drawing gravel along the center of the street, leaving it in piles, as the evidence tends to show, two or three feet high; and on the 16th day of August, 1890, the day of the accident being Saturday, the workmen, about five o'clock P. M., quit the work and went home, expecting to level down the gravel the following Monday morning, leaving those piles of gravel strung along the street. The appellee, who ran a peddling wagon, had, on the day in question, been in the country peddling and returned to the city about ten o'clock at night with

a load of rags and iron. In going to his home on the nearest route he came to near where Jackson street crosses North avenue, where he had to turn north on Jackson street, and supposing that he was on that street, turned his horses north on North avenue, and in so doing the north wheels of his wagon ran upon the gravel and it tipped over, and in some manner his foot was crushed; presumably by a bar of railroad iron which was on the wagon, falling upon it.

The iron was about six feet long and projected out on either side of the wagon.

The evidence tends to show and the jury were, we think, justified in believing, that those heaps of gravel being on one of the most public thoroughfares of the city were unreasonably unsafe for persons driving along in the darkness of night, unacquainted with the fact of their being there, in the condition of appellee.

It is insisted on the part of appellant that those heaps of gravel were not near so high and formidable as appellee's witnesses would lead one to suppose, and that there was plenty of electric light in the neighborhood so that the appellee could have seen the gravel had he been in the exercise of ordinary care. In answer to these suggestions we are compelled to say after a full examination of the evidence that the jury was clearly justified in finding against it on those issues. According to the testimony of the two Zieglers, Esser, Meyer, Leifheit, and Phillips, the place was not lighted at all by the electric lights and the street where the accident occurred was dark, so that the heaps of gravel could not be observed by a person driving along in a wagon.

And this evidence we think the jury was justified in believing, as against the evidence of appellant. It appears, too, that when the wagon was righted up while empty, in the condition it was just before it tipped over, it took three or four men to hold it up to prevent it from tipping back again as it had done before. This evidence, together with the evidence of other witnesses as to the height of the gravel, justified the jury in finding that it was dangerous. It appears, too, from the evidence of Charles Loveland, who

City of Aurora v. Rockabrand.

has done the city's leveling and spreading of gravel for many years, that it was usual to level the gravel off at night if it was on a public street. It appears, however, that on this occasion the usual precautions were omitted, and this accident happened in consequence. It is contended by the appellant also, that the appellee must have known that the gravel was scattered along the street of North avenue, for, as he went east on such avenue he must have passed over a portion of it before reaching the point where the wagon upset, the gravel having been scattered along for about two blocks and the accident happening at the east end of it.

We think, however, that the evidence fails to show the justification of the appellant in this contention. There are objections made to the special findings of the jury being against the weight of the evidence, but we think they are not maintainable. An objection is made to the instructions, in that the court directed the jury to find the appellant guilty, if the jury believed it guilty from a preponderance of the evidence, as charged in the declaration. We see no error in this instruction. The issues were plainly made by the declaration and pleas and there was no chance for misapprehension on the part of the jury.

It is insisted also, that the damages were excessive. We think, however, as appellee was permanently and wholly disabled, so that he could do nothing toward making a support, that the damages were not excessive. He was a laborer and a purchaser of old iron and rags, by which the evidence tended to show he was enabled to make a good living and support himself and family.

We are inclined to think, everything considered—his injury, pain and suffering and loss of support—that the damages are not excessive.

We have examined the case carefully and find the record unusually free from error, either as to the law laid down by the court or the verdict of the jury.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

JOHN M. LOCKE ET AL.

V.

WILLIAM C. DUNCAN.

Fraudulent Sales—Trespass.

1. Whether a given debt was an honest one, and a sale made to the creditor of a stock of goods was made in good faith, are questions of fact for the jury in a given case.

2. A creditor acting in good faith may take all the goods of his debtor in satisfaction of his debt, although he knows by so doing he leaves his debtor with no means to satisfy the debts of other creditors.

3. Where, in an action of trespass against creditors of the debtor attaching after the sale, such sale being alleged to be fraudulent, and throughout the whole course of the litigation in the court below no other defense is alleged, no attention will be paid to the point first raised herein, that the defendants were not shown by the evidence to have had any connection with the trespass.

4. The entry of a remittitur is proper.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge, presiding.

Mr. WILLIAM D. BARGE, for appellants.

Messrs. MORRISON & WOOSTER, for appellee.

MR. JUSTICE HARKER. In May, 1891, George W. Duncan, a retail dealer of merchandise at Dixon, Illinois, being in failing circumstances, sold and delivered his stock of goods to his brother, William C. Duncan. Appellants, Locke, Huleatte & Co., creditors of George W. Duncan, upon the ground that the sale and transfer was fraudulent, caused a writ of attachment to be sued out of the Circuit Court of Lee County and placed in the hands of George F. Stainbrooke as sheriff.

Stainbrooke levied upon an amount of the goods equal in

Locke v. Duncan.

value to \$793, and took them from the possession of William C. Duncan. An action of trespass was brought in the Circuit Court and a trial was had resulting in a verdict against the attaching creditors and sheriff for \$1,125. On motion for a new trial being made a remittitur of \$332 was entered. The motion for a new trial was overruled and judgment entered for \$793, the value of the goods taken.

The chief contention of appellants is that the verdict is against the evidence. They insist that the goods were at the time of the levy the property of George W. Duncan, and that the pretended sale to appellee was made without consideration and for the purpose of defrauding his creditors.

Appellee testified that in the spring of 1885 he loaned his brother \$750, and soon after entered his service as a clerk at a salary of \$300 per year and his board; that he continued at such salary for four years, when it was raised to \$450 per year, and that he worked at that salary for two years. He further testified that he drew none of his salary and was paid none of the money loaned, having other funds out of which to meet his personal expenses; that when he came to realize the embarrassed condition of his brother he undertook to bring him to a settlement and payment of what was due him, and thereby obtained from him a judgment note for \$3,000; that after judgment had been recovered upon the note and execution issued and levied upon his brother's goods, his brother executed a bill of sale of the stock to him and put him in possession, whereupon the execution was returned satisfied.

Appellee was not contradicted, nor was he in any manner impeached as a witness; but appellants insist that his testimony was so absurd and unreasonable as to be unworthy of belief. We are unable to take that view of it. Evidently, the jury were favorably impressed with his account of the matter and his manner of testifying. Whether the debt was an honest one and the sale was made in good faith, were questions of fact falling within their province to decide. In the absence of error upon any other part of the proceed-

ings, we should not disturb their finding unless it appeared to be manifestly and palpably against the weight of the evidence.

We see no evidence of bad faith on the part of appellee. He does not appear to have taken any step not allowable by law to a creditor seeking the security and collection of his claim against a failing debtor. Under the law in our State he had the right to take the entire stock of goods in satisfaction of his debt, although he knew that by so doing, his brother would be left with no property out of which other creditors could satisfy their debts, provided he acted in good faith. *Hessing v. McCloskey*, 37 Ill. 353; *Hatch v. Jordon*, 74 Ill. 414; *Schroeder v. Walsh*, 120 Ill. 404.

No error was committed by the court in allowing the plaintiff to enter a remittitur. It is a practice so well recognized by the courts of this State that a discussion of it is unnecessary.

It is next urged that the judgment should be reversed because appellants Locke and Huleatte were not shown by the evidence to have had any connection with the trespass. They were not upon the ground and it does not appear that either of them directed the levy or had any personal knowledge of its being made. It does appear, however, that one Robert Hunt, the credit manager of Locke, Huleatte & Co., who went to Dixon to look after the claim, employed an attorney and made the affidavit in which the attachment writ issued. It was at his instance that the proceedings were instituted, and he knew that the goods which he saw in the possession of appellee would be attached. Throughout the entire contest in the Circuit Court, Locke, Huleatte & Co. defended upon the ground that the sale of the goods to appellee was fraudulent, and that the taking of them was justified under the writ. Such a contention can not prevail under the circumstances, when now made for the first time.

We see no error of the court in ruling upon testimony, nor in passing upon the instructions offered.

The judgment should be affirmed.

Judgment affirmed.

French & Potter Co. v. Duncan.

FRENCH & POTTER CO. ET AL.

v.

WILLIAM C. DUNCAN.

Trespass—Fraudulent Sales.

A writ of attachment having been sued out and levied upon certain goods purchased by plaintiff from a debtor of defendant, such sale being alleged to have been fraudulent as to the creditors of the seller, this court holds, the fact being that at the time of the levy the sheriff also levied another writ of attachment on the same goods, indorsing on the back of each writ the same list of goods, that defendant herein can not evade responsibility by showing that others participated in the trespass by suing out and having levied upon the goods other writs, and that it is liable in the full amount of the judgment rendered.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Lee County; the Hon. JAMES SHAW, Judge, presiding.

Messrs. A. K. TRUSDELL and SMITH, HELMER & MBULTON, for appellants.

Messrs. MORRISON & WOOSTER, for appellee.

MR. JUSTICE HARKER. The French & Potter Company, a creditor of George W. Duncan, caused a writ of attachment to be sued out of the Circuit Court of La Salle County, which was placed in the hands of George F. Stainbrook, sheriff of Lee County, and levied upon a portion of a stock of goods which appellee had purchased of George W. Duncan, and was then retailing at Dixon, Illinois.

The goods, valued at \$1,053.40 were taken by the sheriff and disposed of under the writ. Appellee brought suit in trespass against the company and sheriff and recovered a judgment in the Circuit Court for \$1,053.43.

The facts in this case are substantially the same as in the

foregoing case. The reason for refusing to disturb the finding of the jury in that case, as being against the weight of the evidence, are fully set forth in the opinion. Not caring to repeat them, reference is made to the opinion therein filed.

Appellants here made several additional points of contention. To the one that the court erred in refusing to allow appellants to cross-examine appellee as to the consideration of the bill of sale made by George W. Duncan to him, we attach but little importance, because they subsequently placed him upon the witness stand and were allowed the greatest latitude in their examination of him upon that subject.

There was no error in permitting appellee to testify as to the fair market value of the goods taken. Appellants insist that inasmuch as the goods were levied upon by virtue of two writs of attachment, the French & Potter Company could not be held liable for all the goods taken. At the time of the levy the sheriff also levied another writ of attachment on the same goods. He took the goods and indorsed on the back of each writ the same list.

Appellants could not evade responsibility by showing that others participated in the trespass by suing out and having levied upon the goods other writs, and appellee was not compelled to piecemeal his recovery of damages for the trespass.

The instructions given for the plaintiff were in harmony with the decisions of our Supreme Court and were warranted by the evidence.

We see no good reason for reversing the judgment.

Judgment affirmed.

Boyer v. Yates City.

STEPHEN BOYER

V.

YATES CITY.

Dram Shops—Sale without a License—Ordinance.

1. A specific objection based solely upon a particular fact is strictly a waiver of all objections based upon other facts not specified or relied upon.

2. In an action brought to recover a penalty for the alleged violation of a municipal ordinance prohibiting the sale of liquor without a license, the only question raised being as to the propriety of admitting in evidence the record book of the ordinances of the city, containing the ordinance in relation to dram shops, without proof of the due publication thereof, charter providing for the posting of ordinances in public places, this court holds that production of the record was sufficient proof *prima facie* of the due posting of the ordinance in question, and of every preceding action of the city council necessary to make it a valid ordinance; and no other authentication or proof was necessary.

[Opinion filed May 25, 1893.]

IN ERROR to the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. J. A. McKENZIE and J. L. WELLS, for plaintiff in error.

MESSRS. WILLIAMS, LAWRENCE & BANCROFT, for defendant in error

MR. JUSTICE LACEY. This was a suit by defendant in error to recover a penalty for violation of the city ordinance against selling liquor without license. There was no question but there was a sale by plaintiff in error within the corporate limits of defendant in error of intoxicating liquors, contrary to its ordinance. The only serious question raised by plaintiff in error, and the only alleged error, was in the

admission by the court below of the record book of ordinances containing the ordinance in relation to dram shops, under which conviction was sought, without any proof of the due publication of the ordinance which the charter provides—Section 36: “Printed or written copies of all ordinances passed by the city council shall be posted up in at least three of the most public places in said city within thirty days after their passage, and all ordinances shall take effect at the expiration of ten days after such posting.”

Due proof was made of the book containing the official copy of the city ordinances, as kept in the city clerk's office, and the ordinance contained therein. Chapter 12 in relation to dram shops, being the official record of one of the chapters of one of the ordinances of appellee, particularly sections one, four, five and nine, was offered and admitted in evidence against the objection of appellant made at the time, for the reason that no proof of posting was made, and because the certificate of such posting thereto attached was insufficient. The objection was overruled and the plaintiff in error excepted. The entry of posting attached to the ordinance, to the sufficiency of which objection was made, is as follows: “Posted by the city clerk, this 14th day of May, 1888. T. J. Kightlinger, City Clerk. R. A. Lower, President of the City Council;” and with the corporate seal of the city thereto attached. The objection to the certificate is that it fails to show the manner of posting or that it was posted according to the provisions of the charter.

This seems to be the only question of importance in the case. In order to show that the proof of the ordinance was regular, the charter of the city of Yates City, approved March 4, 1869, as especially Sections 30 to 37 of Article 4, of the charter as to ordinances, was introduced in evidence. Section 35 of the charter reads as follows: “All ordinances passed by the city of Yates City shall be recorded in a book purporting to be a record of the ordinances of said city; shall be received in evidence in all courts and places without further authentication or proof.”

Section 37 contains a similar provision when the ordi-

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nances are printed or published in book or pamphlet form or printed and published in any newspaper in Knox County, if purporting to be printed or published by authority of the city council under the corporate seal. All other objections to the proof of the ordinance in law were waived by plaintiff in error by only making the one specific objection. This is held in *T. H. & I. R. R. Company v. Voelker*, 129 Ill., page 540, in which the court says, "a specific objection based solely upon a particular fact, is strictly a waiver of all objections based upon other facts not specified or relied upon."

Without stopping to inquire whether the certificate of the clerk as to the legal sufficiency of the posting of the ordinance was sufficient or not, we think, under the evidence in Section 35 of the charter, the ordinance was sufficiently proven, even without any certificate.

The book of ordinances containing the ordinances of the city was introduced in evidence, and that was sufficient proof *prima facie* of the due posting of the ordinance and of every preceding action of the city council necessary to make it a valid ordinance, and no other authentication or proof was necessary.

We think this was clearly the effect and meaning of the section of the charter in question. In principle this was so decided by the Supreme Court in *T. H. & I. R. R. Company v. Voelker*, *supra*, in passing on a similar provision of a section of a charter of East St. Louis, Sec. 13, Article 7, Private Laws of 1869, volume 1, page 896. The section in question reads as follows: "All ordinances and resolutions of the city, when proven by the seal of the corporation and when printed in pamphlet or book form and purporting to be printed or published by authority of the city council, the same shall be received in evidence in all courts and places without further proof."

The Supreme Court held the production of the pamphlet or book containing the ordinance in question under the seal of the corporation and purporting to be printed and published by the authority of the city council, to be sufficient evidence

of the due existence of the ordinance, and use this language: "Here the proof was made by the corporate seal and the certificate of the city clerk, who was the proper custodian of the seal." "This was all that was required to establish at least *prima facie*, the existence of the ordinance and its terms." Citing *Pendergast v. City of Peru*, 20 Ill. 51, *Lindsay v. City of Chicago*, 115 Ill. 120, and *Schott v. People*, 89 Ill. 195. It will be seen by Section 35 of the Yates City ordinance above quoted, that it is still more liberal in its provisions than the corresponding section in the East St. Louis ordinance, in that it does not require that the passage of the ordinance shall be proven by the seal of the corporation. Yet there is no objection in this case of the proof of the passage of the ordinance, it having been duly certified by the clerk as passed under the seal of the corporation on the 7th day of May, 1888.

We think, then, the objection made by counsel for plaintiff in error is not tenable and the court did not err in overruling it.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

C. S. FIFIELD AND C. H. MORSE

V.

FARMERS NATIONAL BANK OF PRINCETON ET AL.

Fixtures—Sales.

1. Contracts of sale whereby the seller undertakes to secretly retain title in himself, but to give an appearance of ownership in the purchaser, are void as to third parties.

2. Where such seller allows the property sold to be attached to the freehold in a given case, and used in a building as part of the plant, and under a deed running to the purchaser, which required the same not to be removed within a certain number of years, the seller in equity should be held as having waived the secret lien and consented to the machinery being used as a part of the manufacturing plant.

Fifield v. Farmers Nat. Bk.

3. The intention of the parties has much to do with the question, whether certain attachments to realty are to be regarded as fixtures that will pass with the land, and this intention is manifested by acts.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Bureau County; the Hon. DORRANCE DIBELL, Judge, presiding.

On the 1st day of July, 1891, Robert Montgomery and others, citizens of the village of Wyanett, Bureau County, Illinois, entered into a written agreement with one Robert Day by which they agreed to convey to said Day four lots in Brown's addition to said village, and to pay him \$6,000; and in consideration thereof said Day on his part agreed to erect on said lots a factory building, forty-eight by one-hundred feet, two stories high, and to put in the necessary machinery and equip the same for a shoe factory, the deed to said lots to provide that the building and machinery to be placed thereon should not be torn down or removed therefrom for five years. In the same month the lots were conveyed by Orson Tuttle, in whose name the title was placed for that purpose, to said Day, containing the provisions above agreed upon, and that said lots should be used for manufacturing purposes alone, which deed at the time was duly recorded.

By way of compliance with his said contract said Day purchased of appellants, dealers residing in Chicago, the list of machinery hereafter described, to place in the said factory, viz:

		lbs.
McKey Tacker,	weighing.....	100
“ Sewer,	“	450
Gillmore Leveler,	“	850
Bussell Heal Trimmer,	“	300
“ Edge „	“	300
Tapley Heel Burnisher,	“	470
Naumkegg Buffer,	“	180

		lbs.
Roll Buffer,	weighing.....	470
Powder Moulder,	"	1,100
Splitting Machine,	"	200
Ryder Heel Key,	"	55
Stoning Shaft,	"	50
Amazeen Skiver,	"	25
Lufkin Folder,	"	20
Hartford Rounder,	"	800

The above first ten of the said machines were fastened to the floor, or planks nailed to the floor, by lag screws and also belted to the shafting overhead, mostly to the line shaft; A lag screw is a body with a square head on one end and a thread at the other; and these machines were fastened by passing the screws through the holes in the machines made for that purpose and screwing the lags into the floor or plank with a monkey wrench. The line shaft extends east and west and is fastened by lag screws to the stringer which supports the upper floor.

The six last of the machines were fastened to benches by wood screws and belted to the shafting—mostly line shaft—such benches being nailed to the floor. Other of the machinery was placed in the building as follows: The pinking machine and feather edge one screwed to the benches, nailed to the floor, and worked by hand. The Washburn & Hardy Brewster, weighing 150 lbs., is lag-screwed to the floor and is worked by foot power.

The six crispin jacks are screwed to posts and nailed to the benches which are nailed to the floor.

The machinery was all placed in the building under Day's direction, and was put in the building for the purpose of manufacturing shoes, and was all used for that purpose a little, and increases the value of the plant. It was, as the witnesses testified, essential to the plant as placed there, and was especially adapted for manufacturing shoes, and necessary for that purpose, though shoes may be manufactured without it. When the machinery was placed in the building it was not with the purpose of taking it out.

The machines were made of iron and cast holes were made in the legs or bottom parts thereof for the lag or other screws. On most of them belt wheels were placed so that they could be attached by belting to the shafting.

The appellant knew for what purpose the machines were sold and that they would be attached to the factory building in the manner in which they were. The machinery was sold to Day on thirty, sixty and ninety days time, with a proviso that the machinery should remain their property until paid for.

Day failed, and the manufacturing establishment became insolvent. On the 31st October, 1891, Day gave a check on the Farmers Bank to appellants to pay for the machinery, but it was not paid for want of funds and was returned to appellants dishonored. On the 23d November, same year, appellants demanded a return of the machinery.

The appellants on the 24th November started their replevin suit against Day for the machinery, and the sheriff attempted to take it on the writ and deliver it to appellants, but it was not removed from the building. On the 23d day of November, 1891, Day gave to appellee a trust deed on the lots, describing the lots by number without any reference in the instrument to the machinery.

On the 9th, 14th and 15th of December, 1891, several parties obtained judgments against Day and executions were issued thereon and delivered to the sheriff.

The appellee brought a suit in chancery in the Circuit Court claiming a lien on the lots and machinery as fixtures by virtue of its trust deed. The sheriff, Cox, and several other defendants, were made party respondents as well as the appellants. Several answers and cross-bills were filed, some of whom claimed a mechanic's lien, but as far as the questions involved here are concerned we need not notice any of them.

The case was heard and a decree entered against the appellants, sustaining the various liens, and it was ordered that the receiver sell all the property, real and personal, including the machines claimed by appellants, except certain unat-

tached machines and property involved in the replevin suit, which were ordered to be delivered to appellants. From this decree appellants appealed to this court.

Afterward it was agreed that the sale might proceed, notwithstanding the appeal, and that the receiver keep out of the proceeds the sum of \$1,800, and that if the decree be reversed and appellants entitled to the possession of the machines enumerated in the decree and held to be part of the real estate, the court should ascertain and determine their value and the appellants be paid such an amount out of said sum as the machines were worth, it being intended that the \$1,800 should take the place of the machines, as far as their value went.

Messrs. ALDRICH, PAYNE & DEFREES, for appellants.

Messrs. OWEN G. LOVEJOY, RICHARD M. SKINNER and GEORGE S. SKINNER, for appellees.

MR. JUSTICE LACEY. The sole question for our decision in this case is whether or not the machinery in question placed in and attached to the manufacturing building in the manner shown by the testimony and under all the circumstances became fixtures to the real estate and passed by the trust deed of Day to appellee. The question is one not entirely free from doubt and the authorities, as might be expected, are not altogether in harmony.

In consideration of the case we will first notice the nature of appellants' contract with Day in regard to the sale of the machinery. They undertook to retain title in themselves, secret to all the world save the parties to the contract, and thereby give an appearance of ownership in Day to the machines when in fact he had none. Contracts of this nature are disapproved of by courts and judges and held void as to third parties.

The Supreme Court of this State has often passed on the question so holding them void as to third parties. *Jennings v. Gage*, 13 Ill. 610; *Brundage v. Camp*, 21 Ill. 330; *Murch*

v. Wright, 46 Ill. 488; Harvey v. R. I. Locomotive Works, 93 U. S. 664; Chickering v. Bastress, 130 Ill. 206. But in addition to this, appellants allowed the machines to be attached to the freehold and used in the building as a part of the plant, and this, too, under a deed to Day that required the machinery not to be removed within five years. We think, under those circumstances, the appellants in equity ought to be held as having waived the secret lien and consented to the machinery being used as a part of the manufacturing plant. If this should not be so, then Day would be placed in an appearance of affluence by which he could procure credit and deceive the public.

The intention of the parties has much to do with the question whether certain attachments to realty are to be regarded as fixtures that will pass with the land, and this intention is manifested by acts. Arnold v. Crowder, 81 Ill. 56. In speaking on this subject of intention the Supreme Court of Massachusetts in ——— v. Taunton Savings Bank, 23 N. E. Rep. 330, held the following language:

“The tendency of modern cases is to make this a question of what the intention was with which the machine was placed in place * * * Only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifest by his act. It is an intention which settles not merely his own rights, but the rights of others who have or may acquire interest in the property. They can not know his secret purpose; and their rights depend, not upon that, but upon the inferences to be drawn from that which is external and visible.” We cite also Calumet Iron & Steel Co. v. Lathrop, 36 Ill. App. 249; First National Bank v. Adam, 138 Ill. 483; 28 N. E. Rep. 955; decided October 31, 1891, by the Supreme Court of Illinois.

It will be observed that appellants did not place the machinery in the factory building, but it was done by Day, who undoubtedly placed it there with the intention of its becoming a part of the factory, and this was at least impliedly assented to by appellants.

The fact, if it be a fact, that appellants claimed these ma-

chines before the taking the real estate mortgage by appellee can make no difference. Having allowed the machines to be placed in the building, appellants ought not to be allowed to change their attitude when creditors were pressing for security and payment. It is not necessary to consider the question of whether appellants rescinded the contract with Day by tendering to him the check or draft he gave them in payment for the machinery.

Feeling satisfied that justice has been done in the case we will not attempt to review the authorities cited with a view to reconciling them. The decree of the court below is therefore affirmed.

Decree affirmed.

PETER SCHERTZ

V.

FIRST NATIONAL BANK OF CHESTER.

47	124
56	318
47	124
161s	510

Corporations—Liability of Stockholders—Constitution and Laws of Kansas—Pleading—Variance.

1. A declaration describing a judgment against one, is not supported by the production of a judgment against that one and another, or others. A material variance exists in such case.

2. A State Constitution may be drawn with a view of submitting a given matter to the legislature, by enactment to give it vital force and effect, and to leave it in abeyance until such time as it sees fit to act.

3. When a constitutional convention indicates an intention to so frame the instrument as to secure the debts of a corporation of a given class by the individual liability of the stockholders to an amount equal to the stock owned by them, but leaves it to the legislature to provide for such other means of security as it should judge most conducive to the public interest, if the legislature should fail to provide a remedy, then the right will still remain, and the common law will supply one. Creditors can not be deprived of their assured security by any omission of the legislature to enact a remedy.

4. A suit at law would be the proper action to bring in this State to recover under the Kansas statute providing that a stockholder of a corporation shall not be liable to pay the debts of the corporation in excess

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of the amount due on his stock, and an additional amount equal to the stock owned by him. The stockholder may make a defense if he has a valid one.

5. A judgment against a corporation in such cases is conclusive as to the amount and validity of the creditor's claim, and when suit is brought to enforce the shareholder's statutory liability, such judgment can be impeached only for fraud and collusion, or for want of consideration.

6. A judgment stating the sum of the judgment and costs and adding "whereof let execution issue," is equivalent to formally stating that the "plaintiff have and recover from the defendant" the amount found due.

[Opinion filed May 25, 1893.]

APPEAL from the County Court of Woodford County; the Hon. A. M. CAVAN, Judge, presiding.

Messrs. A. R. RICH and W. L. ELLWOOD, for appellant.

We insist that even if the constitution and statute of Kansas do create a liability, the liability can not be enforced in this State. There is no case in our State where such a liability has been enforced, and we believe that our Supreme Court when called upon to pass upon the question, will follow the Supreme Court of Massachusetts, and other States, and decline to enforce the liability, and insist that before there can be a recovery against a citizen of this State holding stock in a foreign corporation, there must be an adjudication against him in the State where the corporation exists. Massachusetts, New Hampshire, West Virginia and Wisconsin have refused to enforce such a liability. *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 34-37, N. E. Rep. 773, and cases cited therein; *Rice v. Hosiery Co.*, 56 N. H. 114; *Andrews v. Bacon*, 38 Fed. Rep. 777; *Nimic & Co. v. Mingo Iron Works Co.*, 25 W. Va. 184; *May v. Black*, 77 Wis. 45, N. W. Rep. 949; *Bank of North America v. Rindge*, 27 N. E. Rep. 1015, which is a Massachusetts case concerning another Kansas corporation.

In *New Haven Horse Nail Co. v. Linden Spring Co.*, the court says: "Where the rights sought to be passed upon and determined, are those which arise from the rela-

tion between a corporation and its members, they depend upon a local law which exists at the place of its creation, and true policy would seem to require us to leave them there to be determined." "The liability which the stockholders are alleged to be under to the corporation and its creditors has little analogy to a demand for a debt due, according to the general recognized principles of law. It is of a peculiar character involving the organic law by which the corporation is created and requiring local administration." (In *Young v. Farwell*, 28 N. E. Rep., our own Supreme Court quotes this language approvingly.) "We have heretofore, in similar cases, declined to pass upon them, and determine the relation existing between a foreign corporation and its members, and the obligations arising therefrom." The court then cites some of its former decisions. Continuing, the court says: "The reason why we should not, in the case at bar, undertake to enforce the alleged obligations of the members of this corporation, appear decisive. They are quite different from those which arise in Massachusetts from a contract to have and subscribe for shares. By our laws, as settled by many decisions, in the absence of an express promise to pay for shares, none is created by a mere subscription therefor. Nor is any created by a mere agreement to take shares. No personal liability exists, as the corporation can by law assess such shares, and sell them for non-payment of assessments, which is held to be a sufficient remedy." The court then says that while a different rule prevails in many other States, it has been approved in others, and cites as approving the rule, *Kennebeck & P. R. Co. v. Kendall*, 31 Me. 470; *Rail Road Co. v. Johnson*, 10 Frost, 403; *Rail Road Co. v. Bailey*, 24 Vt. 465; *Seymour v. Sturges*, 26 N. Y. 134.

It then says: "It does not seem advisable that we should seek to enforce a liability thus differing from any which would have been incurred if the defendants had subscribed for shares of stock in a corporation formed in this State."

We think this reasoning sound and very forcible, and can well be applied in this State, and to the case at bar.

The case of *Bank of North America v. Rindge*, 27 N. E. R. 1015, is one of the latest cases upon the subject, and is a Massachusetts case concerning a Kansas corporation. We can not quote this case at length, but hope the court will examine it carefully. There the court, after saying it does not take jurisdiction to enforce the liability of stockholders in foreign corporations, and citing the *New Haven Horse Nail Co.* case, says: "The case at bar furnishes a strong illustration of the propriety of this course. If the plaintiff, as a creditor of the Kansas corporation, without obtaining any previous judgment in Kansas establishing the defendant's liability as a stockholder, can maintain an action directly and in the first instance against him in Massachusetts, for the purpose of charging him as a stockholder, under the qualified liability set forth in the declaration, then it would follow that the plaintiff might also institute a similar action against him in California, or in any number of other States where service could be obtained. The plaintiff might also institute similar actions for the same debt in different States against other stockholders. In such case it is probable that a judgment against one stockholder without satisfaction would be no bar to actions against others, but it is obvious that the defendants in such actions might be put to great inconvenience in ascertaining, and indeed might find it practically impossible to ascertain, what steps the plaintiff might have taken against other stockholders in different States. A dishonest creditor might possibly recover several times over against different stockholders in different States, before they respectively could ascertain the facts. Likewise the defendant, if compelled to pay under a judgment recovered in one State, would find it difficult, if not impossible, to enforce a contribution from other stockholders residing elsewhere. Moreover if the plaintiff might maintain such actions against the defendant, and against other stockholders in different States, until he should finally recover satisfaction, other creditors of the Kansas corporation might also do the same. If every creditor of a Kansas corporation, which has no property with which to respond to a

judgment obtained by such creditor against it in Kansas, may therefore, without any further proceedings in that State to charge the stockholders, maintain an action against every stockholder in every State of the Union where service can be obtained, and pursue such action until satisfaction is obtained from some stockholder in some State, it is obvious that a large amount of litigation might ensue, under which substantial justice, as among the stockholders, could not be worked out."

Other considerations are urged for the rule adopted in Massachusetts, and we think the opinion lays down the rule that our Supreme Court should, and will, adopt.

The case quoted from was before the Appellate Court of the First District of this State, and was discussed and approved in the case of *Lamson v. Fowler*, the opinion in which is set out in this brief. It will be claimed that the Appellate Court of the Third District of this State in *Tuttle v. Bank of Republic*, held the liability could be enforced in this State. It is true that opinion is opposite to that of the Appellate Court of the First District. We hope, however, the court will read that opinion carefully, for to our minds it is remarkable. We think it confuses the liability with the remedy, and it utterly ignores the question of jurisdiction which was raised by appellant's counsel, as well as many other questions, and virtually amounts to saying, we approve the judgment, and do not think it necessary to pass upon the other question raised.

Questions unsettled in this State, and which the Supreme Court of Massachusetts has taken pages to discuss, deeming them of great importance, and questions which have engaged the attention at great length of other courts, including the Appellate Court of the First District, it does not deem of sufficient importance to notice.

The facts in connection with this very corporation and the appellee will show the soundness of the reasoning of the Supreme Court of Massachusetts. Six other suits like this are pending at this moment in Woodford County, in the court from which this appeal is taken; three in Tazewell County,

one in Peoria County, and two in Cook County; all brought by appellee by reason of the same judgment against stockholders in the Husted Investment Company.

We have no doubt that our Supreme Court, when the question comes before it, even if it holds that the constitution and laws of Kansas create a liability, will hold that before any recovery can be had in this State, either in law or in equity, the courts of Kansas must adjudicate the relations of the stockholder to the corporation and toward the creditors, and determine the amount of the liability of the stockholder, and we think that this is clearly indicated by the trend of the decisions of our court in *Patterson v. Lynde*, 112 Ill. 196, and *Young v. Farwell*, 28 N. E. Rep. 845.

This would be the enforcement of the judgment of a sister State and not of the statutory liability.

Messrs. H. C. FULLER and R. H. RADLEY, for appellee.

Certainly all stockholders resident in Kansas are subject to its laws, and can not free themselves from their liability as stockholders in a corporation of that State, by a temporary or permanent absence therefrom.

The laws of that State fix all contracts executed therein, and the purchase of shares of stock in a corporation of that State is a contract made there, and governed by its laws, the same as a promissory note made in that State. If a contract made in that State imposes certain obligations, why should a change of residence alter them? *Spelling on Private Corporations*, Sec. 913.

We do not care to discuss this subject much further than has been done in the case of *The National Bank of the Republic v. Sidney Tuttle*, which has lately gone to the Appellate Court of the Third District from Bloomington. We append hereto the ruling of Judge Sample, of the Appellate Court of the Fourth District, who passed upon the pleadings in that case, and also file herewith a certified copy of the opinion in the same case, decided at Springfield in October last; possibly, also, an abstract of the record in that case and the brief of appellee therein.

We have never looked upon the decision of *Lamson v. Fowler* (which is copied in full in appellant's brief, and was also copied in full in the brief of appellant filed in the *Sidney Tuttle* case in the Appellate Court), as an authority in this cause, for the reason that the judgment obtained against the Kansas corporation (and which was the foundation of that chancery suit) was rendered in the State of Illinois. In our view, the laws of Kansas do not contemplate, for instance, that a creditor in that State can go into the State of California, obtain a judgment there against a Kansas corporation whose president is found temporarily in California, have an execution issue in California, and then sue a stockholder in Kansas, basing his action upon the California judgment. The laws of Kansas, doubtless, contemplate a judgment and an execution in the State where the corporation has its domicile. And yet, in the case of *Lamson v. Fowler*, no judgment was had in Kansas, and no proceeding taken in that State to evidence the insolvency of the corporation. If, then, the object in view of the Kansas laws was not observed in *Lamson v. Fowler*, how can it be said to be an authority?

MR. JUSTICE LACEY. This was an action of assumpsit commenced by the appellee against the appellant in the County Court of Woodford County, Illinois, and proceeded to trial before a jury, resulting in a verdict and judgment for appellee in the sum of \$350, from which judgment this appeal is taken.

The appellee is a corporation duly incorporated under the United States Banking Act, in 1889. The appellant was a stockholder in the Husted Investment Company, a corporation under the laws of the State of Kansas, duly incorporated in 1888, owning three and one-half shares of its stock, of \$100 each, and had been such stockholder for over two years. The Husted Investment Company was not a religious, charitable, or railroad corporation, and was organized for the purpose of transacting business for profit, and was authorized by its charter "to accumulate and loan funds, etc., etc., and to buy and sell, both as principal and agent,

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bank stocks, bills, notes and other securities; to carry on business of a loan and trust company, and in general to have, hold and to do all things necessary and proper in the premises."

The foundation of the action was that the appellee on the 10th November, 1891, recovered a judgment in the State of Kansas, District Court of Wyandotte County, against the Husted Investment Company, for \$5,288.80, upon an indebtedness existing to appellee by said company on and since July 21, 1890, and that execution had been issued and returned "*nulla bona*."

At the time of the accruing of the indebtedness and rendition of the judgment the appellant was and ever since had been the owner of the said three and one-half shares of stock in said company.

The Husted Investment Company, as averred in the declaration, had been insolvent for seven months last past. The appellant was a resident of the State of Illinois and had been from the five years last past, and had not during the time been in the State of Kansas, and owned no property therein. The liability was claimed by virtue of the appellant being a stockholder in the Husted Investment Company under the constitution and laws of the State of Kansas. The appellant pleaded the general issue and eleven additional pleas, to all which a demurrer was sustained by the court below and the issue tried on the plea of the general issue, appellant obtaining his pleas, to which demurrer was sustained.

The cause of action is founded on Sec. 2, Art. 12, of the Constitution of Kansas, and on Sec. 32, Chap. 23, chapter on Corporations, and Sec. 46 of the Statute of Kansas, as follows: Constitution, "Sec. 2. Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations or corporations for religious or charitable purposes."

Sec. 32 of Statutes: "If any execution shall have been issued against the property or effects of a corporation, except a railroad or a religious or charitable corporation, and there can not be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except under an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Sec. 46. "No stockholder shall be liable to pay debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him."

The statute was adopted some nine years later than the constitution and long before the company was organized.

It is insisted that the provision of the constitution above set out was not self executing, and could not have any force and effect until its provisions were enacted into law by the statute of Kansas; that it should be read and treated as directory to the legislature, and that the words "dues from corporations *shall* be secured by individual liability," should be construed "*may*" be so secured.

We are not inclined to take that view of the character of the section of the constitution in question. A constitution may be and often is drawn with a view of submitting the matter to the legislature by enactment, to give it vital force and effect, and to leave it in abeyance until such time as the legislature sees fit to act; but on the contrary, framers of constitutions often enact complete legislation, and there seems in modern times more of a tendency to adopt such a course than formerly. Where a principle is regarded as fundamental and of vital importance, the framers of constitu-

tions are apt to fix the matter irrevocably by complete enactment, intending to put it out of the power of a legislature to alter or change it, or to render it nugatory by non-action.

The power of a constitutional convention to legislate, we suppose, can not be questioned; it may go as far it wills in that direction. In any given case it is only a matter of intention to be deducted from the natural import of the language that we have to deal with.

In our view, the language seems clearly to indicate an intention on the part of the constitutional convention of Kansas to so frame the instrument as to secure the debts of a corporation of the class named, by the individual liability of the stockholder to an amount equal to the quantity of the stock owned by him, but to leave it to the legislature to provide for such other means of security as it should judge most conducive to the public interest.

In such case the legislature might legislate and direct the mode of enforcing such provision, as it did in this case; and such procedure must be followed, especially in the State of Kansas. But if the legislature should fail to provide a remedy, then the right would still remain, and the common law would supply one. The creditors could not be deprived of their assured security by any omission of the legislature to enact a remedy.

As a sample of legislation by a constitution we cite *The People v. Rumsey*, 64 Ill. 44, and cases there cited; see also *Cook on Stockholders*, Sec. 213.

The legislature of Kansas recognized the binding effect of the constitution by simply providing a remedy for its enforcement without specifically re-enacting the provision relating to the liability of stockholders. The Supreme Court of the State of Kansas assume the liability of a stockholder under this section of the constitution and the statute (*Abbey v. Dry Goods Co.*, 44 Kansas, 415), and the courts of Kansas hold that a stockholder is liable severally and individually and so enforceable against each stockholder.

The appellant, by his attorney, raises the point that the

appellee can not sue and enforce the liability of a stockholder in this State in any other court than in equity, under our statute of July 1872, Sec. 25, Chap. 32, R. S., entitled Corporations. We do not deem this point well taken. Our statute only applies to corporations created under that act, and to Illinois corporations, and has reference to insolvent corporations, and closing them and winding up their business.

According to the laws of Kansas the stockholder was individually liable and could be sued by the creditor in his own name, after obtaining judgment against the corporation, and having execution issued and returned, "no property found." In that event the stockholders became individually liable under the statute and laws of Kansas and could be sued by the creditors in his own name. An action of law would be the proper remedy in Kansas, and if correctly applied in such case, its recovery here would be the same, unaffected by our corporation act of 1872.

No question of the kind of action and procedure could arise. A suit at law would be the proper action to bring. *Wincock v. Turpin*, 96 Ill. 135.

We perceive no reason why this suit may not be maintained in this State. In Kansas it could be, and the liability is fixed, and no question of pro-rating the amount of the indebtedness arises. The appellant owed an amount equal to his stock and appellee had a right to collect. It is not like the case of *Patterson v. Lynde*, 112 Ill. 196. In that case the remedy was in equity; the liability was to the corporation and not to the debtor. It may be, Judge Scholfield says, a remedy "can be enforced in a different way by a debtor against a delinquent stockholder in other States and different laws." In Kansas this very thing can be done and why not here? See *Tuttle v. Bank of the Republic*, 3d Dist., filed October 3, 1892; *Flash v. Conn.*, 109 U. S. 371. The case of *Lamson v. Fowler*, 44 Ill. App. 186, is not in point, as, in that case, the creditor obtained no judgment in Kansas against the debtor corporation before proceeding in this State. The case of *North American v. Rindge*, 27 N. E. Rep. 1015 (Mass.), appears to be in point, but we fail to fully appre-

ciate the reasons, given in the opinion for the refusal to allow the suit to be maintained in Massachusetts. The final conclusion of the opinion is that "a large amount of litigation might ensue, under which substantial justice, as among the stockholders, could not be worked out." But what has a stockholder in Kansas, after judgment obtained there against the corporation, and return of execution no property found, to do with this question? It is a stockholder's duty to first pay, and then demand a pro-rating with other stockholders and the corporation. The same argument of inconvenience might be made of a dozen or more securities on a promissory note scattered in different States. They might all be sued separately in different States, and it might be very difficult afterward to get pro-rating with each other or satisfaction of the principal maker; yet, who would say that they should be exempt from suit in their new domicile if they remove from the State?

Culver v. Third Nat'l Bank of Chicago, 64 Ill. 538, was a similar case in principle to this in respect to the right to bring a suit at law, only the suit was brought under the laws of this State and by the charter and law no suit had to be first brought against the corporation. The stockholder could be sued in the first instance. Like the suit under consideration, as the suit against the corporation had already been brought in Kansas, the stockholder was liable in a suit by the creditor. The court says it is no objection that the stockholder may be subjected to several suits, as he can in no event be answerable for more than the amount "of his stock." The appellant's subscription to the stock of the Husted Investment Company was made with direct reference to, and in view of the organic and statutory laws of Kansas, and by such act he offered his personal security to any future creditor to an amount equal to his stock. The company to whose stock he had subscribed, did not hesitate to avail itself of the comity allowing it to deal in other States, and to go into the State of Illinois and contract debts. The agreement of such stockholder, by the act of

subscription made in view of the laws of Kansas, was to pay the amount for which he agreed to be liable to the creditors of the company before asking for a pro rata settlement on his own account with the other stockholders.

That was a matter with which the creditor was to have no concern. Is there anything in equity and justice opposed to the enforcement of such a contract in any State of the Union?

By removing from the State in which the contract was made, ought such a debtor be allowed to escape a liability voluntarily assumed, on the plea that he might be subject to inconvenience in a future attempt to recoup himself out of the other stockholders—his partners—for any amount which, on a final settlement of the company affairs, might be adjudged due him?

It seems to us there could scarcely be a case appealing more loudly for the extension of that comity due from one State to a sister State of the Union than in the present.

The appellant could have the same defense in the courts of this State that he would have had in Kansas had he been sued in that State. There is nothing in the laws of this State, or the settled policy or practice of our courts, antagonistic to the laws of Kansas in respect to the enforcement of the liability of a stockholder in favor of a creditor. On the contrary, it has often been done in this State in action at law under former laws. *Schalucky v. Field*, 124 Ill. 617, and cases there cited. The courts of this State, as a policy, are free to enforce the collection of indebtedness of a stockholder in accordance with his liability. If liable in such a way as that equity is the only proper procedure, then the creditor must pursue his remedy in such court. *Rounds v. McCormack et al.*, 114 Ill. 252.

In *Wincock v. Turpin*, *supra*, it is held that "when the statute has disclosed that the liability of the stockholder shall be to the depositor, it would seem that it might be supposed other persons were precluded from interfering or intermeddling in a matter which alone interests or concerns the depositor." And again, "the liability is legal, is cre-

ated by the statute, and must be controlled by its provisions. When the statute creates a liability, the remedy is invariably at law unless the statute provides for proceedings in equity." A receiver appointed for a corporation in another State by a court of equity to wind up its affairs would be allowed to sue in the courts of this State "as a matter of interstate comity," to prosecute actions at law to recover unpaid balances due on capital stock. *Patterson v. Lynde*, 112 Ill. 196, and cases cited.

The suit under consideration is being prosecuted under the laws of Kansas, which the courts of this State will enforce as a matter of comity among States in the same manner as though the same laws existed here. And if the same law existed here as in Kansas, the remedy would be at law, as shown by the above citations. We therefore think a court of law is the proper court in which to bring the action.

The appellant objects to a number of rulings of the court in regard to the pleadings, and on trial, on the admissibility and competency of evidence. But nearly all the questions have been passed on except a very few, and need not again be noticed.

The ninth plea, to which a demurrer was sustained, attempted to raise an issue as to the validity of the claim of appellee against the Husted Investment Company, in that it was an indebtedness incurred by the company to the appellee by indorsing and selling to it, as agent of another party, a promissory note on which indorsement the judgment in question was founded, the investment company receiving the proceeds of the note from appellee and passing it over to its principal, the holder of the note.

It is insisted that the transaction was *ultra vires* as to Husted Investment Company.

While we deem the consideration good and not subject to any defense by the Husted Investment Company, and within the scope of its powers while dealing with third persons, we hold that the appellant could make no defense to this action on the grounds sought. He is a member of

the corporation and is concluded by the judgment against it. In the work of Cook, upon stockholders, it is laid down as a rule of law, as follows:

“Sec. 222. In general, the judgment in these cases against the corporation is conclusive as to the amount and validity of the creditor’s claim. Consequently, when suit is brought to enforce the shareholder’s statutory liability, that judgment can be impeached only for fraud and collusion, or for want of jurisdiction.” See also *Buchanan v. Meisser*, 105 Ill. 638; *Thompson v. Meisser*, 108 Ill. 359; *Shalucky v. Field*, 124 Ill. 617; *Fuller v. Ledden*, 87 Ill. 310.

It is insisted that because the Supreme Court of Kansas in *Howell v. Mangelsdorf*, 33 Kan. 194, held that “the liability is only secondary to the corporation,” it follows that appellant could make the defense to the cause of action after judgment against the corporation. This decision only follows the statute, which requires judgment to be rendered in favor of the creditor and execution to issue, and return thereof *nulla bona*, before suit against the stockholder can be instituted.

The suit is secondary in this sense, and in that the judgment against the corporation is not a judgment against him. The stockholder would not be precluded from making a defense if he had a valid one. He may have paid in some legal way a sum equal to his stock, or he might show that he did not own the stock in the time and manner required by the constitution and laws to make him liable, and other possible defenses, but not, we apprehend, that the corporation did not owe the debt represented by the judgment against it. This disposes of that plea, and the alleged error of the court in rejecting evidence tending to impeach the validity of the judgment for the cause named.

The sixth, seventh and eighth pleas were a mere attempt to plead matters of law that have been disposed of already in this opinion.

The eleventh plea attempts to deny the truth of the sheriff’s return. Under the laws of Kansas the sheriff’s return would be conclusive in the absence of fraud and

collusion, which are not averred in the plea. The second additional plea is bad in attempting to set up, as a ground of defense, want of diligence in not attempting to collect the judgment off the four persons joined in the judgment with the improvement company. The Kansas statute requires nothing of the kind. The law of Kansas does not require the corporation to be dissolved before the stockholder can be required to pay, as the third plea averred and attempted to set up as defense. It was therefore bad.

On the trial, appellant objected to the introduction of the judgment in evidence. First, on account of it not being in form a judgment. Second, on account of there being a variance between it and the declaration. The judgment recites the finding of the plaintiff, on the cause of action, in the sum of the judgment and certain costs of suit, and adds, "whereof let execution issue." While this judgment might not be in the exact form in this State that is required, it appears to be in the form followed in Kansas and has all the elements of a judgment.

The amount due is found, and an order for execution to collect it. This is equivalent to formally stating that the "plaintiff have and recover from the defendant" the amount found due. We think the court did not err in treating it as a judgment.

Another objection is that the execution, in being issued against the goods and chattels of the Husted Investment Company, did not follow the judgment and was therefore invalid. This, we think, while an irregularity, did not render it void. Except for the error hereinafter mentioned the evidence would have shown a cause of action. It will therefore be unnecessary to notice any alleged error in regard to instructions, the admissibility or rejection of other evidence, or the objection made to the introduction in evidence to the jury of the opinions of the Supreme Court of the State of Kansas rendered in certain cases, and the comments thereon by appellee's attorneys to the jury.

There is, however, a more serious question in the case, and that is, the question of variance between the declaration and

proof as respects the admissibility of the judgment in favor of appellee against the Husted Investment Company, rendered in the State of Kansas.

The statute of that State does not appear to contemplate the joinder by a creditor of any debtor of the company in a suit against it, but nothing in the statute prohibits it being done. In this case it so happened, that in the claim of the appellee against the above named corporation, there were other parties jointly indebted with the latter and were joined in the action of the former in its suit against it, and final judgment was obtained against all such parties jointly. Such joinder, however, could not affect the right of the appellee under the statute of the State, and so far as such rights are concerned, the name of the parties joined in the same suit and judgment may be treated as non-consequential and immaterial.

But a more serious question arises when we come to treat of the question of variance.

The declaration described a judgment as against the Husted Investment Company alone, when the one offered in evidence appeared to be rendered against said company and several others jointly.

Counsel for appellant, at the time of its being offered in evidence, objected to its introduction on the ground that such judgment was a variance between it and the one set out and described in the declaration. The court overruled the objection and allowed it to be read in evidence, to which ruling the appellant by his counsel at the time excepted. Was there a variance? Is a declaration describing a judgment against one only supported by the production of a judgment against that one and another, or others?

It appears, according to the ruling of the Supreme Court of this State, such a condition constitutes a material variance and forbids the introduction of such evidence under such a declaration. *Mann v. Edwards*, 138 Ill. 21, and cases cited.

The court then erred in admitting the judgment in evidence under the declaration without amendment.

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It being the foundation of appellee's action, without which being introduced in evidence the appellee must fail of recovery, the court erred in its ruling in a material matter requiring reversal. The judgment of the court below is therefore reversed and the cause remanded.

Judgment reversed and cause remanded.

CITY OF STERLING

V.

VICTOR SCHIFFMACHER.

Municipal Corporations—Negligence—Excavation in Street—Personal Injuries—Contributory Negligence—Absence of Light and Barrier—Independent Contractor.

1. The rule that "the principle of *respondet superior*" does not exist in cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act and has no choice in the selection of workmen, and no control over the manner of doing work under the contract, while true in a general way, has its exceptions.

2. Where a municipal corporation has the duty, either by express statute or implication of law, cast upon it, to keep its streets and crossings in a reasonably safe condition for public travel, such duty can not be delegated to another in whatever form it may be attempted, so as to free the corporation from liability for any injury occurring to another on account of such failure to observe such duty.

3. Where acts which cause a given injury are collateral to the contract work and are negligently done, the negligent person is alone responsible; but where the work contracted for is intrinsically dangerous in itself, and it is negligently done and injury ensues, the municipality is liable.

4. In an action brought to recover for a personal injury occasioned through plaintiff's falling into an excavation dug in a street in pursuance of a contract entered into by a city with a third person touching the construction of certain sewers, this court holds that the injury in question occurred on account of failure on the part of the city to use reasonable care to keep the streets in a reasonably safe condition, or of a failure to properly guard or light the dangerous excavation, a duty imposed by law upon it which it could not abdicate; that no notice to the city was

required that the ditch was not guarded nor lighted; and declines to interfere with the judgment for the plaintiff.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding.

The facts in this case are about as follows, viz: Some time prior to the 27th day of September, 1891, the appellant, the city of Sterling, was desirous of constructing a system of sewers in the city known as the "Avenue 'G' Sewer System;" that for the purpose of constructing such sewer the city entered into a contract with one Michael Real, by which he undertook to furnish all the material and labor and do all the work necessary for the construction and completion of the work; that in pursuance of such contract, the said Real entered upon the work by digging a ditch along and through Avenue "G," one of the streets mentioned in such "sewer system," and in order to construct such sewer through said avenue it was necessary to dig such ditch across Wallace street and at the point where the injury to appellee, hereafter to be mentioned, occurred.

Wallace street and Avenue "G" cross each other at right angles. A sidewalk is laid on the north side of Wallace street, extending from the east to west line of Avenue "G," and to connect the sidewalk on either side of Avenue "G," two planks were laid upon the ground parallel with said Wallace street and about one foot apart, and a ditch about one and one-half feet deep excavated at the place of injury. About seven or eight feet of this crossing near the middle of Avenue "G" had been removed by the employes of Michael Real on the day before the alleged injury.

On Sunday about eight o'clock P. M., the appellee going west on the north side of Wallace street and passing over the crossing at Avenue "G," coming to the point where the planks had been removed and the ditch dug, stepped off the walk and fell into the ditch, which was about one and one-half feet deep, and broke the third finger of his right hand

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between the end of the finger and the first joint, necessitating amputation at the first joint.

The declaration charges the appellant with negligence in allowing the excavation to be made over which the crossing had been laid and to remain unguarded and unlighted, and also negligence in suffering the crossing to be removed from its place in Avenue "G," and permitting an excavation to be made in said avenue underneath and across the line of the crossing, and in leaving the same open and unguarded and unprotected, by means whereof the said injury occurred, the appellee at the time being in the exercise of due care and caution in attempting to cross the excavation.

The case was tried before a jury which returned a verdict for appellee for the sum of \$465, upon which the court, after overruling appellant's motion for a new trial entered judgment. From this judgment this appeal is taken.

Messrs. H. C. WARD and C. J. JOHNSON, for appellant.

Mr. J. E. McPHERRAN, for appellee.

MR. JUSTICE LACEY. It is insisted by the appellant that the appellee is barred from recovery on account of his own negligence in not leaving the crossing and going around the end of the ditch, which at the time did not extend more than twelve feet south of the crossing, leaving half of Wallace street free from any ditch or excavation and the south end of the excavation being lighted by a lantern placed on a plank which rested upon a couple of barrels set on end. The evidence, however, conflicts as to there being any light at the south end of the ditch. Sachem, who fell into the ditch on the same evening at the same place, saw no light there. There was a kerosene lamp painted red at the man-hole on the south side of Wallace street, thirty-seven feet south of the crossing, but it shed no light to the northward on the crossing in question, as testified to by some of the witnesses.

There was no barrier at the ditch at the crossing to

prevent any one walking into the ditch who was attempting to cross on the crossing, or any light at the same point to show that there was no plank across the ditch.

The testimony of the appellee was that while going across Avenue "G" while it was pitch dark, on this crossing from east to west, he fell into the ditch in question and was injured; that there was nothing to protect the ditch from any one walking into it, nor was there any light so that any one might see it. He further testified that he knew they were working there, but did not know they were working right under the crossing; he saw them working north of there toward the railroad, but did not know the crossing had been taken up, or how far south they were with the excavation of the ditch; and there were no lights or guards or anything to notify him of the danger. If the jury believed this testimony, and it was justified in so doing, then the verdict was justified by the evidence, unless under all the facts the appellant was free from liability because the digging of the ditch had been let out to contractors, a question we will notice hereafter. It is contended by counsel for appellant that it is not liable, for the reason that it is not the superior in the case liable for the acts of its servants in excavating the ditch in question. It is insisted that the contract to do the work had been let out to one Michael Real, by which he was to furnish all the material and lumber and do all the work necessary in constructing the sewer and the work in digging the ditch and removing the plank at the crossing where the alleged injury occurred; and therefore it is urged that Michael Real was the superior, and responsible as the principal for the acts of his servants, who were guilty of the negligence charged and not the appellant. Also it is claimed, even if the appellant were liable for the negligence of the servants of Real in leaving the ditch unlighted and unguarded, the city had no notice of it, express or implied, from the lapse of time from the digging the ditch to the accident.

We have examined the question with considerable care and interest and have arrived at the conclusion the point

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can not be sustained. It is no doubt true, as a general principle, as laid down by Dillon in his work on municipal corporations, Sec. 792, that “the principle of *respondeat superior* does not exist in cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act and has no choice in the selection of workmen and no control over the manner of doing work under the contract.”

But this rule has its exceptions and the case at bar is one of them. The rule seems to be that where a municipal corporation has the duty, either by express statute or implication of law, cast upon it to keep its streets and crossings in a reasonably safe condition for public travel, then that duty can not be delegated to another in whatever form it may be attempted so as to free the corporation from liability for any injury occurring to another on account of such failure to observe such duty. This question has been expressly decided in *City of Springfield v. LeClaire*, 49 Ill. 476, and nowhere overruled. The court in passing on that case holds the following expressive language: “As the city is the principal in the duty imposed, it must occupy the same position when damages are claimed for a neglect of that duty. Neither the one nor the other can be shuffled off the city by their act.”

Dillon, in his work on municipal corporations, Sec. 791–793, lays down the same doctrine in express terms. And in the latter section, after reciting the above rule, says: “But the employer is not liable where the obstruction or defect in the street causing the injury is wholly collateral to the contract work and entirely the result of the negligence or wrongful acts of the contractor or his servants. In such case the immediate author of the injury is alone liable.”

As cases of this kind may be cited *City of East St. Louis v. Giblin*, 3 Ill. App. 219, where the city hired a man for a fixed sum to cause a tree within the city to be cut down, and in doing which it fell on the wife of the plaintiff and injured her so she died. The city was not liable for the reason that the party cutting the tree was held to be the

party guilty of the injury. Also Joliet v. Harwood, 86 Ill. 110, where the party hired to do the work of blasting rock in the streets, did it in such a manner that a piece of the flying rock struck a window of Harwood, a man owning property on the street, and broke it. The city was held liable on the grounds that the work contracted to be done was intrinsically dangerous in itself. This under another rule of law. Those cases illustrate the doctrine laid down in the exception; *i. e.*, where the injury is caused by acts collateral to the contract work, and entirely the result of the negligence of the contractor. The falling of the tree in the first case was entirely collateral to the duty of the city to keep the streets in repair, and was not immediately connected with it. It was entirely the fault of the person cutting the tree. The injury was not received on account of failure to keep the streets in safe condition, but because the act of felling the tree was careless; the same in regard to blasting the stone. In that case the city was liable, not because of failure to keep the street in good repair or excavations guarded, but because the blasting the stone was intrinsically dangerous and the city when it let such contract and set such dangerous processes in motion is presumed to assume such responsibility and under such rule of law is held liable. When all the rules of law applicable are fully understood, there is little difficulty in solving the problem under any given state of facts. In the case at bar it is clearly seen that the injury occurred on account of failure on the part of appellant to use reasonable care to keep the streets in a reasonably safe condition, or in failure to properly guard or light the dangerous excavation; a duty imposed upon it by law, it could not abdicate. No notice to the city was required that the ditch was not guarded nor lighted. The city let the contract and knew the work was being done, and it was obliged to use reasonable care and see the streets were kept reasonably safe for pedestrians; hence it must take notice of everything done in connection with the excavation of the streets so far as concerned the reasonable safety of the streets and crossings. We perceive

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no variance between the proof and the declaration. Numerous criticisms are made on the instructions of appellee, which we have examined, and find them in accordance with the views we have above expressed touching the liability of the appellant for the negligence of its contractor Real and its servants, and concerning the question of appellant's notice to the failure of Real to properly light and guard the ditch and crossing. Some of appellee's instructions are given in form of general principles of law, and may seem to ignore the hypothesis of appellee's notice of the condition of the sidewalk at the time of the injury, though not necessarily obnoxious to such objection; but the appellant's instructions on that and all other disputed points are so full and explicit, that if the instructions are taken as a whole, there could be no possible danger for the jury to be misled.

It seems to us that upon the whole the case was fairly tried and the law laid down to the jury with substantial accuracy.

Perceiving no error in the record the judgment of the court below is affirmed.

Judgment affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY

V.

ALBAN KOEHLER, BY NEXT FRIEND, ETC.

Railroads—Negligence—Personal Injuries—Passenger—Failure to Stop Freight Train.

1. In case of a wrongful failure and refusal to stop a railroad train, a party injured thereby may recover all such damage as he might suffer by reason of that act.

2. Acts touching the assisting of passengers upon and from trains are not within the apparent scope of the powers of a station agent. Their duties do not authorize any inference upon the part of the public that

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they are authorized to give directions to passengers in getting on or off cars.

3. Persons are presumed to have knowledge of the law prohibiting boarding and disembarking from trains while in motion.

4. A person can not recover for any injury occasioned by negligence merely which would have been avoided by the exercise of ordinary care on his part.

4. While a plaintiff, who is in the exercise of ordinary care, may be guilty of slight negligence, a want of ordinary care on his part would constitute such negligence as would preclude a recovery.

6. In an action brought to recover for personal injuries alleged to have been occasioned through obeying the instruction of a station agent directing plaintiff to board a moving freight train, this court holds that such direction was not within the real or apparent scope of the authority of such agent, and that the judgment for the plaintiff can not stand.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of La Salle County; the Hon. GEORGE W. STIPP, Judge, presiding.

MESSRS. THOMAS S. WRIGHT, ROBERT MATHER and G. S. & E. ELDREDGE, for appellant.

Mr. M. T. MOLONEY, for appellee.

MR. JUSTICE CARTWRIGHT. Alban Koehler, a young man eighteen years old, received an injury to his foot while he was attempting to get on a moving freight train of the Chicago, Rock Island & Pacific Ry. Co., and brought this suit by his next friend to recover damages for such injury. The declaration averred the purchase of a ticket by the plaintiff and his intention to become a passenger, and charged that defendant failed and refused to stop its freight train at the depot, but kept it in motion; and that an agent, who was alleged to have been then and there the ticket agent of defendant, directed and ordered plaintiff to jump on and get aboard of said moving train, which he attempted, because of such direction and order, and was injured. It was charged that defendant was guilty of negligence in not stopping the train, and in the direction and order given by

the ticket agent, and it was averred that plaintiff was in the exercise of ordinary care. There was a trial resulting in a verdict for plaintiff for \$2,700, from which \$1,000 was remitted; and the court, after overruling a motion for a new trial, entered judgment for \$1,700.

With respect to the charge of negligence in not stopping the train, it will be observed that the injury and damage alleged in the declaration did not result from the act of failing or refusing to stop the train as a proximate cause of such damage. If there was a wrongful failure and refusal to stop the train, a party injured thereby might recover all such damage as he might suffer by reason of that act by which he would be prevented from taking passage on that train. No such damage was alleged, but it was averred that plaintiff attempted to get on the moving train by reason of an order and direction of the ticket agent, and the injury resulted from such attempt being made while the train was in motion. The only act which could connect the defendant with the injury as an efficient cause of it was the alleged order and direction of the ticket agent.

Whether such an order and direction was given was in dispute at the trial, but inasmuch as the jury found for plaintiff, the fact that it was given may be regarded as settled by the verdict. Plaintiff's version of what occurred on the occasion may therefore be taken as true. He testified that he went to the station with a companion on the morning of June 6, 1889, intending to go to Depue to load ice into barges; that they found Frank Haas there attending to the station work and bought tickets of him and asked him whether or not a freight train would stop there on which they could ride to Depue; that Haas said that the train would be there soon and further said, "If she don't stop we will make her stop;" that when the train was approaching Haas said, "The way it looks she won't stop;" that plaintiff said, "I don't believe she will stop," and Haas again said, "If she don't stop we will make her stop," and held up two fingers toward the approaching train; that Haas then said, "I don't believe that she will stop," and

told one of the boys to go east and another west and jump; that Haas asked for plaintiff's bundle and took it to throw to him when he should get on; and that plaintiff made the attempt and caught hold of the railings at the front steps of the caboose, but slipped and fell under the car and was hurt. The evidence was that Haas was selling tickets and doing the ordinary work of an agent about the station, and that the freight train was one that did not carry passengers.

Assuming that Haas told the boys to separate along the platform and jump on the train, and that such direction was negligently given, it would be necessary in order to fix liability upon the defendant that such direction should be within the real or apparent scope of the authority of Haas, as agent. The order must have been given under authority of the company, either expressly conferred upon Haas or fairly implied from the nature of his employment and the duties incident to such employment. There is no claim and can be none that the company had in fact authorized Haas to give such an order, or to act in a matter of that kind at all. The act directed was expressly prohibited by the company by a notice posted in plain view of all the parties who were present. It must therefore be shown to be an act done in the performance of a service which the public would have a right, from the nature and circumstances of the employment, to infer that the company had employed him to perform. *C. B. & Q. R. R. Co. v. Casey*, 9 Ill. App. 632; *C. & A. R. R. Co v. Michie*, 83 Ill. 427; *C. M. & St. P. Ry. Co. v. West*, 125 Ill. 322; *Cooley on Torts*, 535.

It is a matter of common observation that agents and employes at railroad stations do not take part in the work of putting passengers upon trains. In their relation with the public they sell tickets, check and handle baggage, putting it on and taking it off from trains, furnish information concerning trains and rates of fare and freight, signal trains which stop only by signal for passengers and perform other like services; but they are not found helping passengers on or off from trains or giving orders on those subjects. The

care of the public in their relation as passengers to trains running upon railroads are not committed to station agents, but to those who control and operate the trains. Any assistance or direction in getting upon trains comes from brakemen or other employes in the train service. Acts in that department of the passenger service are not within the apparent scope of the powers of a station agent. The duties usually performed by agents of the same class as Haas do not authorize any inference on the part of the public that they are authorized to give directions to passengers in getting on or off cars. The evidence therefore failed to fix any liability upon defendant for the act of Haas. In this instance a notice had been posted which was designed to prevent persons from getting on cars while in motion, and which would show that the agent had no authority to authorize it. The notice was on the side of the depot, in the form of a sign fourteen inches long and about ten inches wide, which read: "Chicago, Rock Island and Pacific Railway. Notice: Getting on and off trains while in motion is always dangerous, and is prohibited under all circumstances. E. St. John, Manager." Plaintiff was around that place for some time before the train arrived and he testified that he might have seen the notice, but could not tell whether he did or not and paid no attention to it. Whether he saw the notice or not it was negligent in him to attempt an act so obviously dangerous as attempting to get upon the moving train, although he was advised to do so by Haas. There was no right of control or direction on the part of Haas, and plaintiff owed no duty of obedience to his directions. He was left at perfect liberty to refuse to obey the direction without any evil consequences to himself resulting from disobedience. There was no compulsion and no force used or threatened, and it is not claimed that plaintiff was not old enough to know better than to make the attempt. He had arrived at years of discretion and was responsible for his own acts. A person of ordinary prudence under like circumstances, when there was no exigency or compulsion or anything to prevent the use

of discretion, would not have attempted to get on the moving train. The act was also prohibited by a statute, of which he is presumed to have had knowledge. Rev. Stat., Chap. 114, p. 79.

The first instruction for plaintiff is objected to. It appears to be according to the formula prescribed for an instruction on the rule of comparative negligence as we understand it, but it has the following addition: "Ordinary care is such as reasonably prudent persons would generally take under like circumstances, and want of such care would not be slight negligence on the part of plaintiff." This was the only attempt made in the instructions to define ordinary care or negligence and on the subject of negligence it was not correct. Plaintiff could not recover for any injury occasioned by negligence merely which would have been avoided by the exercise of ordinary care on his part. *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202.

It is held that a plaintiff who is in the exercise of ordinary care may be guilty of slight negligence, but a want of ordinary care on his part would constitute such negligence as would preclude a recovery. If plaintiff fell below the standard of ordinary care his negligence must necessarily be of a higher degree and embrace slight negligence, because ordinary care does not exclude the idea of slight negligence, and if he exercised ordinary care he observed all the care the law required of him and was not guilty of any negligence that would bar a recovery. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358.

The evidence failed to establish negligence on the part of appellant or ordinary care on the part of appellee, but proved that the injury to appellee was due to his own negligence. The judgment will be reversed.

Judgment reversed.

Finding of facts to be incorporated in judgment.

We find that the defendant, the Chicago, Rock Island & Pacific Railway Company, was not guilty of any or either of the acts of negligence alleged in the declaration; that the plaintiff Alban Koehler was guilty of negligence which

Butler v. Wallbaum Stone & Mining Co.

caused the injury and damage in said declaration mentioned; that said Alban Koehler was not at the time of such injury in the exercise of ordinary care for his safety, and that there is no evidence tending to prove that said defendant was guilty of any or either of said acts of negligence charged in said declaration.

WILLIAM BUTLER

v.

WALLBAUM STONE & MINING COMPANY ET AL.

Bond—Action of Debt—Conditioned to Supply Building Material—Damages.

1. Whether the sum stipulated to be paid upon breach of an agreement is to be taken as liquidated damages, or only as a penalty, will depend upon the intention of the parties as disclosed by the written contract.

2. What was a reasonable time in which to make a payment in a given case, is a question of fact for the jury.

3. In an action of debt based upon a bond given by a stone company, conditioned to furnish building material within a certain time and upon certain payments, a breach in this respect being alleged, this court holds that as a claim for liquidated damages the second count of the declaration was bad; that the third count, alleging special damages, was good, and that judgment for the defendant can not stand.

[Opinion filed May 25, 1893.]

IN ERROR to the Circuit Court of Henderson County; the Hon. JOHN J. GLENN, Judge, presiding.

The plaintiff in error filed in the Circuit Court a declaration in debt containing three counts. The first is an ordinary count on a money bond for \$2,000. The second count sets out a bond executed and delivered to the plaintiff on the 7th of September, 1886, for \$2,000 by the Wallbaum Stone & Mining Company, principal, and W. W. Wood and James

Barry, sureties, showing conditions; that, whereas the company had failed to furnish certain stone necessary for the construction of a court house at Clarinda, Iowa, within the time limited by a contract made by it with the plaintiff before that time; and whereas, in consideration of the premises and the sum of \$1,000 of the contract price for stone to be advanced by the plaintiff, the company had agreed to deliver all the second story belt course of stone by September 15, 1886, all the remainder required for superstructure by September 30, 1886, and the remainder of the stone as required by the original contract by October 25, 1886; and plaintiff had agreed to advance the said sum of \$1,000 and all necessary sums for the payment of all stock required, as fast as the same should be delivered, and that if the stone should be delivered within the dates named, the bond would be void. The count then avers that the plaintiff did advance the \$1,000 as follows: \$500 on the 13th of September, 1886, and \$500 on the 22nd of September, 1886; that such advancements were made within a reasonable time after the execution and delivery of the bond; that he advanced all necessary sums for the payment for all stock required, and that he paid the contract price for the finished work as fast as the same was delivered, but that the company did not deliver the second story belt course of stone required for the superstructure of the court house building by the 15th of September, 1886; did not deliver the remainder of the stone required for the superstructure of the building by September 30, 1886, and did not deliver the remainder of the stone as required by the contract of October 25, 1886. The count claims the sum of \$2,000 as liquidated damages. The third count sets out the same bond and alleges special damages as the result of the failure on the part of the principal to perform the conditions with reference to furnishing the stone.

A general demurrer to the entire declaration was sustained by the court and judgment rendered against the plaintiff for costs.

Messrs. KIRKPATRICK & ALEXANDER, for plaintiff in error.

Butler v. Wallbaum Stone & Mining Co.

MESSRS. PEPPER & SCOTT, for defendants in error.

MR. JUSTICE HARKER. The only question submitted to us is the sufficiency of a declaration in debt filed by the plaintiff in error.

There are three counts. The first is on a money bond. It is in the usual and approved form and we can not understand why the Circuit Court sustained a demurrer to it.

The second count sets out a bond for \$2,000 *in haec verba* and claims that sum as liquidated damages. It is contended by the plaintiff in error that as the Wallbaum Stone & Mining Company, principal in the bond, was in default on a contract made by it with the plaintiff and was liable to the plaintiff in an action of assumpsit for that reason, and that the furnishing of the stone promptly was of vital importance to the plaintiff, who was erecting a large public building under contract with the county authorities of a county in Iowa, the circumstances in which the parties were placed show clearly that it was intended by the parties that in case of another default the defendant company should be liable in the sum of \$2,000 as liquidated damages. The only circumstances which we can consider, of course, are those disclosed by the obligation itself as set forth in the declaration. Whether the sum stipulated to be paid upon breach of an agreement is to be taken as liquidated damages, or only as a penalty, will depend upon the intention of the parties as disclosed by the written contract. In the obligation before us it is not recited that the sum to be paid in case of default is to be taken as liquidated damages; nor can such an interpretation be placed upon it after a consideration of the whole tenor and subject of the agreement. As a claim for liquidated damages the count was bad.

The third count sets out the bond *in haec verba*, and alleges special damages as the result of a failure on the part of the principal to perform the conditions. That the plaintiff performed his part of the agreement and advanced the \$1,000 within a reasonable time after the delivery of the bond, is clearly alleged. Payment within a reasonable time

after the delivery of the bond was all that was required. What was a reasonable time was a question of fact for the jury.

We do not think the position of defendants in error, that the payment of the entire \$1,000 was a condition precedent to the delivery of any stone under the contract, tenable. We gather from the recitals in the bond that the \$1,000 was to assist the company in procuring stock; not to purchase the stock. The whole tenor of the instrument shows that it was the intention of the parties that the money should be advanced as needed by the company for that purpose.

In our opinion the count was sufficient.

Reversed and remanded.

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CHICAGO, MADISON & NORTHERN RAILROAD COMPANY

V.

HERMAN EICHMAN.

Railroads—Negligence of—Embankment—Flowage of Farm Lands—Culverts—Insufficient Capacity of—Evidence—Instructions—Farm Crossings—Sec. 62-5-6, Starr, etc., Ill. Stats.—Trespass.

1. An instruction containing an assumption of a fact in dispute is bad.

2. The obligation resting upon railroad corporations to construct farm crossings, when and where the same may become necessary for the use of proprietors of adjoining lands are purely statutory; where a new right is given by statute and the relief for its violation specified, the remedy must be enforced in the mode pointed out by the statute.

3. A lessor railroad company is not liable for trespasses committed by the servants—over whom it has no control—of the lessee company, committed in connection with repairing the right of way; nor for damages arising from culverts getting out of repair after the road was turned over to the lessee company.

4. In an action brought to recover from a lessor railroad company, for damage to farm lands alleged to have been occasioned through insufficiency of culverts in its right of way, this court holds, in view of the

C., M. & N. R. R. Co. v. Eichman.

evidence, and the fact that the damages allowed for the plaintiff were grossly excessive, that the judgment in his favor can not stand; and further, that the true rule of damages in this case was compensation for the loss of the crop for 1890, the rental value of the land until restored to fertility, and the labor and expense necessary to restore it.

5. Evidence as to condition and behavior of culverts since date of lease is admissible in such case.

[Opinion filed May 25, 1893.]

IN ERROR to the Circuit Court of Stephenson County; the Hon. JAMES SHAW, Judge, presiding.

MESSRS. JAMES I. NEFF and J. H. STEARNS, for plaintiff in error.

MESSRS. GARVER & FISHER, for defendant in error.

MR. JUSTICE HARKER. In 1887 the Chicago, Madison & Northern Railroad procured a right of way and constructed its road across a quarter section of land belonging to the plaintiff below, Herman Eichman. In the western part of the tract was a dry ravine, draining quite an area of land. Across this ravine the company built its road-bed, with an embankment, putting in three rows of eighteen-inch tile at the bottom to afford an outlet for surface water from the area drained. In March, 1888, it leased its rolling stock and railroad to the Illinois Central Railroad Company for the term of its chartered existence, which latter-named company has since then operated the road under its lease. In June, 1890, during a heavy rain storm, a pond of water accumulated in the ravine above the embankment and flooded three or four acres of Eichman's land. For the damage thereby occasioned he brought suit in case against plaintiff in error and recovered judgment for \$300.

In the declaration were nine counts. The first and second charged the construction of the road bed across the ravine without constructing the necessary culverts and sluices required by the natural lay of the land for drainage. The third, fourth and fifth charged failure of the company to give plaintiff's farm necessary farm crossings. The sixth,

seventh, eighth and ninth charged trespass in entering upon plaintiff's close and piling up dirt there while putting in a new culvert after the overflow mentioned. The court sustained a demurrer to the third, fourth and fifth counts and upon the trial excluded all evidence applicable to the sixth, seventh, eighth and ninth counts. Consequently the case was tried by the jury upon the first and second counts.

Counsel for plaintiff in error contend that there can be no recovery under the pleadings, because the declaration counts for damages for non-construction of culverts in the railroad embankment, when it is undisputed that at the time of the original construction three eighteen-inch culverts were put in.

We do not think that either one of the counts will bear the construction placed upon them by counsel. They each charge in substance that the culverts were of insufficient capacity to take care of the surface water.

It is also contended that plaintiff in error is not liable for any damages done by the overflow, because it was not due to any defect in the original construction of the road. Counsel insists that it appears from the evidence that the culverts as originally put in were ample to carry off all the drainage from the watershed in question. Upon this point there was a difference of opinion with the witnesses introduced. We think the evidence was sufficient to authorize a recovery on account of insufficient capacity of the culverts.

This company of course would not be liable in this suit for any damage occasioned by the culverts getting out of repair after the road was turned over to the Illinois Central Railroad Company. But it was entirely proper for the court to admit testimony showing the condition of the culverts and how they had behaved in rain storms since the date of the lease. There was no better way of showing their capacity.

The damages allowed by the jury, however, were grossly excessive.

Of the ground flooded, one-half acre was in potatoes, just coming up, one acre in corn, about two inches high, and

about two acres in grass. There was a total loss of the crop for that year. The water remained but a short time and the land was not permanently injured. A new culvert with ample capacity was constructed the following February, and the only damage allowable was the loss of the crop for 1890, the rental value of the land until restored to fertility, and the labor and expense necessary to restore it. It clearly appears that the estimate of damages by plaintiff's witnesses was fanciful and speculative. The land was not worth over \$65 or \$70 per acre, as admitted by a witness on cross-examination, who in his examination in chief placed the damage done the plaintiff at \$600. The damages allowed by the jury largely exceeded the value of the entire land flooded.

In the third instruction given for the plaintiff the court told the jury "that the defendant had no right in the construction of its railroad bed to so construct the same as to obstruct the natural flow of surface water so as to overflow any part of the premises of another. This was an assumption of a fact in dispute and made the instruction bad.

For the error in giving this instruction and because the damages are excessive the judgment will be reversed and the cause remanded for another trial.

The defendant in error has assigned as cross-errors the action of the Circuit Court in sustaining a demurrer to the third, fourth and fifth counts of his declaration and in excluding all the testimony introduced under the sixth, seventh, eighth and ninth counts.

The court properly sustained the demurrer to the three counts mentioned, which sought a recovery for failure on the part of the company to erect necessary farm crossings. The obligation resting upon railroad corporations to construct farm crossings when and where the same may become necessary for the use of proprietors of adjoining lands are purely statutory. If the company neglects or refuses to build such crossings the statute points out the mode of redress afforded to the owner of the land. 2 Starr & C. Ill. Stats., Chap. 114, Secs. 62, 65, 68. He can give notice to construct the crossing, and if the company then fails, con-

struct it himself, and recover as damages double the cost and expense of the same. Where a new right is given by statute and the relief for its violation specified, the remedy must be enforced in the mode pointed out by the statute.

It was not error to exclude the evidence introduced under the counts for trespass, *quare clausum*. The alleged trespasses were committed in 1891, nearly three years after the Illinois Central Railroad Company went into possession under its lease. Plaintiff in error had no connection with or authority over the men who did the work of putting in the new culvert, and if in doing so trespasses were committed they can not be regarded as having been committed within the exercise of any of its franchise. Appellant was not liable.

Reversed and remanded.

HERBERT H. CLARK ET AL.

V.

A. C. SPAFFORD ET AL.

Fire Insurance—Mutual Company—Act of March 11, 1869.

1. At common law a number of people may enter into mutual covenants to indemnify each other against loss by fire and unless restricted by statute such agreements will be valid.

2. The enforcement of a proportionate contribution from the numerous parties to the agreement for mutual indemnity in the case presented, and the ascertainment and assessment of the proportionate shares of such parties are proper subjects for a court of equity, to which its methods of procedure are well adapted.

3. In an action brought to recover for loss by fire upon a certificate issued before the company commenced business but during its organization, it being provided that it should not so commence until a certain amount of insurance, in not less than a certain number of risks, should have been subscribed, and the premiums thereon aggregating not less than a sum named paid in cash, this court holds that there is nothing in the contention of defendants that the certificates in question were void because in derogation of the statute concerning insurance companies, and

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that the bill disclosed no right in the complainants to any relief under their certificaters; that the certificate holders did not assume to act as a corporation; that there was no misrepresentation as to the owners of the property destroyed; that the demurrer to the amended bill should have been overruled, and that the order sustaining the same and the decree dismissing said bill must be reversed and the cause remanded, with directions as to the proper course to pursue.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of La Salle County; the HON. CHARLES BLANCHARD, Judge, presiding.

Messrs. SNYDER & STEAD and L. B. CROOKER, for appellants.

Messrs. C. A. WORKS and D. B. SNOW, for appellees.

MR. JUSTICE CARTWRIGHT. In the Circuit Court a demurrer was sustained to the amended bill filed by appellants in this case and the bill was dismissed at their cost. The material facts stated in the bill and by the demurrer, admitted to be true, are as follows: Certain defendants named in the bill were engaged in organizing and incorporating an insurance company under and pursuant to an act entitled "An act to incorporate and govern fire, marine and inland navigation insurance companies, doing business in the State of Illinois, approved March 11, 1869," and all acts amendatory thereto; said company when incorporated to be known as the Illinois Manufacturers' Mutual Insurance Company, with principal offices at Rockford, Illinois. They had filed in the office of the auditor of public accounts their declaration and charter, together with proof of publication of intention and the certificate of the attorney-general as required by law. The object of the company as stated in the charter was to make insurance upon manufactories and all other kinds of buildings, dwelling houses and personal property against loss or damage by fire or lightning, upon the plan of mutual insurance, and it was provided that the company

should not commence business until \$200,000 of insurance in not less than 100 separate risks should have been subscribed and the premiums thereon for one year, aggregating not less than \$10,000, should have been paid in cash. Said persons, as an essential step to such incorporation, sought applications for insurance in the proposed company, and about September 1, 1890, their agent applied to complainant, Herbert H. Clark, to take insurance to the amount of \$2,500 on certain property in his possession and being operated in the manufacture of oil and other products from flax seed, under the name of H. S. Clark & Co., which property was owned in part by said Herbert H. Clark, and the remainder was owned by complainant, H. S. Clark, and was in possession of said Herbert H. Clark, as lessee. Said Herbert H. Clark fully informed said agent of the ownership and title of the property, and the agent told him that the application should be in the name of H. S. Clark & Co., and that a policy so written would be in accordance with the law, and would indemnify complainants in their respective properties. An application was made accordingly, and \$62.50 was paid in cash and the note of H. S. Clark & Co., given for \$312.50. A certificate of insurance was delivered to complainants, a copy of which is annexed to the bill entitled "Lloyd's Certificate of the Illinois Manufacturers' Mutual Insurance Co., of Rockford," which certified that H. S. Clark & Co. had effected insurance to the amount of \$2,500 for the term of five years on said property, and contained all the customary conditions of the insurance, proof of loss, suit, etc., with the following additional provisions: "Said applicant has made and signed an application for membership and insurance in a certain proposed mutual fire insurance company, to be known as the Illinois Manufacturers' Mutual Insurance Company; and this certificate is issued as evidence of, and becomes on its acceptance by said assured a mutual agreement between said assured and such other parties as have heretofore or shall hereafter become like applicants for membership and insurance in said proposed "Illinois Manufacturer's Mutual Insurance Company," acting as individuals, and not in the

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attempted exercise of any corporate powers whatsoever, to indemnify each other against any loss by fire or lightning under the conditions which may occur during the term aforesaid, and also to contribute to all necessary expenses in and about such matter proportionately. * * * And said assured hereby irrevocably appoints and constitutes the parties whose signatures are affixed hereto, his true and lawful attorneys in fact to issue like certificates (except as to date, amount, premium) to such other applicants for membership and insurance in said proposed Illinois Manufacturers' Mutual Insurance Company as aforesaid in such amount as they may deem proper, and to administer in his behalf the funds paid under this and said other certificates for the purposes of said protection against fire and the expenses of this trust, with full authority to surrender all residue thereof to the treasurer of said proposed company when application shall be made for license supported by the proper number of applications under the statute in that case made and provided. And it is further agreed that upon said proposed Illinois Manufacturers' Mutual Insurance Company becoming licensed and organized, and insurance upon said applications for membership and insurance therein become operative therein, then this agreement, without further action or declaration of either of said parties, shall become ended, and taken as canceled, anything herein to the contrary notwithstanding, provided that said company thereupon delivers to said applicant its standard form of policy."

This certificate was signed by defendants, A. C. Spafford, N. S. Aagesen and F. G. Hogland, "attorneys in fact for applicants for membership and insurance in the proposed Illinois Manufacturers' Mutual Insurance Company of Rockford, Ill." Several hundred other similar applications were made and certificates issued to other persons signed by said attorneys in fact for all the applicants, whereby it was alleged that each certificate holder became bound to the other certificate holders for mutual indemnity under the conditions of the certificates. It was further averred that complainants' property was totally destroyed by fire and notice

thereof was given and proof of loss made, but the attorneys in fact and agents for the certificate holders upon the occurrence of this loss, discontinued business, took up the certificates except from complainants, returned to the other certificate holders their notes and the cash not spent and abandoned the proposed incorporation. The bill made the incorporators and certificate holders defendants, and sought contribution from them to pay the complainants' loss.

The principal claim of appellees is that the "Lloyds certificates" issued were void because in derogation of the statute for the government of insurance companies, and that the bill therefore disclosed no right in the complainants to any relief under their certificate. It is not denied that at common law a number of people might properly enter into mutual covenants to indemnify each other against loss by fire, and that unless restricted by statute such agreements would still be valid. But it is urged that the certificate holders were engaging in the general business of insurance and attempting to act as a corporation and exercise corporate powers before being legally incorporated, and that such action was in opposition to and in violation of the statute. It seems to us that the certificate holders were not endeavoring to defeat the purpose of the statute, and that their action could not have that effect. An attempt was being made to create a corporation in conformity with the statute, and it was necessary to obtain applications and cash to a certain amount in order to carry out that purpose. It might not be expected that persons not directly interested in accomplishing the intended object would make applications, pay cash and make notes without any indemnity and when the corporation if created might reject their applications. The proposed corporation could not effect insurance or afford them indemnity. That could be done only after its organization should be completed. *Gent v. Manf. & Mer. Ins. Co.*, 107 Ill. 652; *Diversy v. Smith*, 103 Ill. 378. The plan by which appellants could secure temporary indemnity pending the completion of the organization was in furtherance of the object of the statute as an

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important and material aid to fulfilling its requirements. Nor did the certificate holders assume to act as a corporation. The agreement was provisional and temporary only until the corporation should be licensed to do the business.

In the conditions of the policy the term "this company" is employed, and it is argued that this meant the non-existent corporation which could not enter into any contract of insurance, and therefore the contract was void. It seems evident that this term was used to mean the persons who became parties to the contract of insurance with complainants and not what was styled a proposed corporation which the contract recognized as not yet able to insure and whose completed organization was to terminate the contract. We are unable to see that the parties violated the law in any manner.

It is also claimed that there were such willful misrepresentations as to ownership of the property as would defeat a recovery. The facts stated in the bill show that there was no misrepresentation, but a full disclosure of title, and that complainants, who were the owners, were described as H. S. Clark & Co. on the advice of the agent. Lastly it is urged that equity has no jurisdiction.

The enforcement of a proportionate contribution from the numerous parties to the agreement for mutual indemnity, and the ascertainment and assessment of the proportionate shares of such parties are proper subjects for a court of equity, to which its methods of procedure are well adapted.

In our opinion, the demurrer to the amended bill should have been overruled, and the order sustaining the same and decree dismissing said bill are reversed and the cause is remanded, with directions to overrule the demurrer and to take such proceedings thereafter as are not inconsistent with this opinion.

Reversed and remanded.

47	166
67	316
47	166
79	385

JAMES CLABBY ET AL.

V.

CHARLES W. SHELDON AND J. H. CARNEY.

Schools—Injunctions to Restrain Erection of School House—Dissolution of Interlocutory Injunction—Practice—Appeal and Error.

1. The hearing on a motion made in accordance with the provisions of Secs. 15, 16, 17, 18, 19 and 20, Hurd's Revised Statutes, Chap. 69, page 802, is not contemplated to be final on the merits of the case where facts are in issue.

2. A temporary injunction having been granted in a given case, affidavits filed in support of a motion to dismiss not agreed to be read in evidence as upon final hearing, a given court can not consider them as evidence, upon such hearing.

3. No appeal can be taken from an order dissolving a temporary injunction, unless the cause has been submitted on its merits, and the injunction then dissolved. In such case, it would not be necessary to enter a formal decree dismissing the bill to authorize an appeal.

4. Where a bill sets up valid grounds for relief and temporary injunction is granted, and upon the coming in of an answer and affidavits denying the allegations of the bill, the injunction is dissolved, it does not follow that the bill should be dismissed.

5. An appeal will not lie from an interlocutory decree dissolving an injunction; but a decree dissolving an injunction may be either interlocutory or final. It will be final where no other relief is sought than an injunction, and where it is dissolved for want of equity on the face of the bill; but such an order of dissolution will not be regarded as final where there has been an answer or replication, and there is equity on the face of the bill and the hearing not final on its merits, but only on motion alone, or where there is other relief sought.

6. In the case presented, this court holds as erroneous the dismissal of the bill upon entering the order dissolving the injunction and that the bill should have been set down for trial.

7. Where upon hearing in such case the proof shows that the equities were with the complainant, the temporary injunction should be revived and made perpetual.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Livingston County; the Hon. THOMAS F. TIPTON, Judge, presiding.

Clabby v. Sheldon.

Messrs. McILDUFF & TORRANCE, for appellants.

Messrs. H. H. McDOWELL and G. W. PATTON, for appellees.

MR. JUSTICE LACEY. The appellants filed their bill in equity against appellees seeking injunction against them, school directors, and their contractor, from building a school house at a certain point and from carrying out the contract generally. The bill is based on certain alleged irregularities and omissions in the vote by which the school house was authorized to be built and site purchased, also want of notice to appellant Clabby, one of the directors, of a meeting called to purchase a school-house site and to let the contract. The respondents, the appellees here, answered, putting in issue the material allegations of the bill, a temporary injunction having been granted according to the prayer of the bill.

Upon the coming in of the answer and replication the appellees moved the court to dissolve the injunction, which motion the court took under advisement. The appellees supported their motion by their answers and certain affidavits of various witnesses which were taken and filed with the court.

The court thereupon, on the 5th day of January, 1892, at the January term of the court, after a full hearing of said motion, dissolved the said injunction and dismissed the bill, retaining, however, the said bill for the purpose of assessing damages on the injunction bond. It will be perceived that the cause was not submitted to the court for final hearing on its merits, nor were the affidavits on file agreed by the appellants to be read in evidence as upon final hearing, and without such agreement the court could not consider them as evidence upon such hearing.

The motion to dissolve the temporary injunction was made under Secs. 15, 16, 17, 18, 19 and 20, Hurd's Revised Statutes, Chap. 69, page 802. The hearing on a motion made in accordance with the provisions of these sections is not contemplated to be final on the merits of the case where facts

are in issue. Section 20 provides that "depositions taken upon a motion to dissolve an injunction may be read in the final hearing of the case."

It will be seen therefore that *ex parte* affidavits may not be thus read. From an examination of the record and the above provisions of the statute, it will be seen that all that was submitted to the court by the parties was the motion to dissolve the temporary injunction, and that was the only question the court should have passed upon; and if the injunction was dissolved, as it was, the bill should have been retained for final hearing on its merits. The dissolution of the injunction by no means settled the case, for upon a final hearing on the evidence, had it appeared that allegations of appellants' bill were sustained, then the court should have revived the injunction and made it perpetual. The court passed upon the merits of the bill when that question was not submitted to it. It should only have passed on the question of the dissolution of the temporary injunction. Had the court not dismissed the bill the cause would not be properly before us, for no appeal could be taken from an order dissolving a temporary injunction, unless the cause had been submitted on its merits, and the injunction then dissolved. In such case it would not be necessary to enter a formal decree dismissing the bill to authorize an appeal. In the case of *Prout v. Lomer*, 79 Ill. 331, it was held that an appeal would lie from an order dissolving an injunction where the only relief sought was an injunction. In the above cited case it was held that there was no equity on the face of the bill, admitting all the allegations to be true. It was an attempt of a principal maker of a note to enjoin a bank from collecting it, against the maker, because the bank held it as collateral, to secure a debt from the payee and it was averred that the bank held other and ample security for the payment of its debt and that as between complainant and the payee, the note was fraudulent. The court held that as the maker of the note sought to be enjoined was not a surety on it, but principal, he had no standing to compel the bank to resort to collaterals for its payment and affirmed

Clabby v. Sheldon.

the decree of the court below. Where a bill sets up valid grounds for relief and temporary injunction is granted, and upon the coming in of an answer and affidavits denying the allegations of the bill, the injunction is dissolved, it does not follow that the bill should be dismissed. *Beam v. Denham*, 2 Scam. 58; *Martin v. Jamison*, 39 Ill. App. 248; *Gillet v. Booth*, 6 Ill. App. 429.

In no case can a bill be heard on its merits on the bill and answer except where replication is not filed within four days from filing the answer; and after filing it the cause is ready for hearing and may be heard, but in the latter case there must be proof taken in the regular way. Chap. 22, Sec. 28, Hurd's R. S. 220.

But on the coming in of the answer prior to final hearing the defendants may move to dissolve the injunction either in vacation or term time, either on the testimony or for want of equity on the face of the bill. Sec. 14 and 15, Chap. 69, pages 301 and 302 Hurd's R. S. An appeal will not lie from an interlocutory decree dissolving an injunction. *Prescott v. Magehee*, 4 Scam. 326. But a decree dissolving an injunction may be either interlocutory or final. It will be final where no other relief is sought than an injunction, and where it is dissolved for want of equity on the face of the bill. *Prout v. Lomer*, 79 Ill. 331; *Titus v. Mabee*, 25 Ill. 232; *Prescott v. Magehee*, *supra*. But such an order of dissolution will not be regarded as final where there has been an answer or replication, and there is equity on the face of the bill and the hearing not final on the merits, but only on motion alone or where there is other relief sought. *Beam v. Denham*, 2 Scam. 58, and other cases cited. In the case at bar there was no final hearing on its merits. The motion to dissolve the injunction before that time ordered was submitted to the court, but the injunction was not dissolved for want of equity on the face of the bill. Among other things it was charged in the bill and denied in the answer that Clabby, one of the school directors, and one of the appellants, had no notice of the letting of the contract to build the school house sought to be enjoined and that the contract

was fraudulent, the house being let at \$1,000, when in fact it should cost only \$800. These were vital questions of fact.

The court therefore erred in dismissing the bill upon entering the order dissolving the injunction. The bill should have been set down for trial.

Upon such hearing, the proof may have shown that the equities were with the appellants, in which case the injunction should have been revived and made perpetual. The bill being improperly dismissed, upon which grounds alone any appeal were allowable in the case, the correctness of the action of the court in entering the interlocutory order, as we hold it to be, dissolving the injunction, is not a question proper for us to pass on at this time; we therefore omit to do so. The decree dismissing the bill is therefore reversed and the cause remanded to the Circuit Court for final hearing on the merits of the case upon such evidence as the parties to the suit may be advised it is necessary to introduce.

The decree is therefore reversed and the cause remanded.

Reversed and remanded.

47 170
148s 508

WILLIAM HARRISON

V.

LOUIS A. LENZ, SHERIFF.

Trespass—Sale of Goods Held on Consignment—Bailments.

1. Whether a certain written contract in a given case amounts to a sale of goods, or whether it is a consignment and not a sale, are questions of law to be determined therefrom.

2. When the identical article delivered is to be restored in the same or an altered form, the contract is of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to make a return and the title to the property is changed; it is a sale.

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8. In an action of trespass brought against a sheriff to recover the price of certain goods sold by him on an execution in favor of a person named, the plaintiff contending that the same were consigned to the execution debtor as his agent, and the defendant taking the ground that the transaction was a sale, this court construes the written contract and holds that the same and the transaction under it did not amount to a sale, express or implied; that it was simply a bailment, and renders judgment for the plaintiff.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Marshall County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. JOHN E. POLLOCK and EDWARD BARRY, for appellant.

Mr. FRED. S. POTTER, for appellee.

MR. JUSTICE LACEY. This was an action of trespass by appellant against appellee, sheriff of Marshall County, Illinois, to recover the price of certain goods sold by the appellee on an execution in favor of Martin & Co., dated August 12, 1892, against the goods and chattels of T. L. Harrington, the said goods being levied on as the property of Harrington. The appellant was a wagon manufacturer, residing and carrying on his business in Grand Rapids, State of Michigan. Harrington resided in Henry, Marshall County, Illinois, and was engaged in the sale of wagons at that place, and held certain wagons belonging to appellant on consignment as his agent or factor for sale as is insisted by the latter, but as purchaser and owner as is insisted by appellee. By agreement of the parties on the trial it was stipulated that in case of recovery, appellant should recover the invoice price of the goods as shown by the contract introduced in evidence, and that there were twenty-one wagons sold by the sheriff on the execution against Harrington. The invoice price of twelve of the wagons was \$45 each and twelve of them \$47 each. There were three of them sold by Harrington. It does not appear what the

invoice price of the three sold was, forty-five or forty-seven dollars each. But allowing the three to be of the \$47 class, it would leave nine of the twenty-one sold by the sheriff of the \$47 wagons and the balance of the \$45 wagons, or the amount realized by the sheriff according to stipulation of \$963.

There was but one consignment of goods made by the appellant to Harrington and that was of the date of 1st day of June, 1893, under a written contract between the parties dated 4th March, 1893, and the wagons levied on and sold by the appellee were a part of that consignment. There is no evidence to show that Harrington ever represented to any one that he was the owner of the wagons or that appellant ever authorized him to do so; but on the contrary Harrington informed one of the execution creditors before the execution was issued that he was not the owner of the wagons but held them on consignments. There is no evidence of any actual fraud in the relations of appellant and Harrington or covert attempt to deceive the public. The entire case hinges on the construction to be given to the contract between Harrington and appellant under which the wagons were shipped. If under a fair construction it was a sale then the court below decided the case correctly; if a consignment, then error was committed and the judgment should have been for appellant. The substance of the contract is as follows: First. Appellant appointed Harrington to act as his agent for the sale of wagons in Henry, Illinois. Second. Harrington accepts the agency and agrees to pay all the freight, local and general taxes on the wagons, have the property housed and under cover and will make good any loss or damage by fire; pay all expenses whatever; will sell to no person or firm on credit, except such as is of undoubted solvency and financially responsible, and on all time sales, which shall not exceed twelve months, will take notes on blanks furnished by and payable to the order of William Harrington (the blanks furnished were payable to Harrington, however), with interest at the rate of seven per cent per annum from date of sale; will indorse all

notes guaranteeing their prompt payment when and where due; will so conduct the business that the time of final payment in Grand Rapids shall not exceed twelve months from date of shipment; will transmit to the office of appellants the proceeds of each cash sale or part cash sale on the day the sale is made, or by first mail thereafter; and on the last day of every month will make out an account of all sales for the current month and transfer the same together with all notes to the office of the party of the first part; and at any time thereafter twelve months from date of shipment, to give his own note for balance of consignment unpaid on four months, with interest at seven per cent from date last above named, if so required by the party of the first part (appellant); but nothing herein shall be construed as amounting to a positive sale without said requirements, and that during the continuance of the contract they will sell no wagon other than the Harrison wagon. Third. It was agreed that the party of the first part (appellant) will invoice all wagons to the party of the second part at the price specified on the back of the agreement, and that on final settlement of each consignment all sums over and above such specified price for which the party of the second part may sell the wagons shall be allowed to the party of the second part as full commission and all other charges more especially enumerated in clause two of this agreement. Fourth. All wagons shipped by the party of the first part shall be on the terms specified in the agreement unless named otherwise in the order and invoice. Fifth. In case the party of second part disregards in any manner any of the covenants of the agreement the same shall, at the option of the said party of the first part, at once cease and determine and the party of the second part shall deliver to the party of the first part on demand all wagons or parts of the same unsold free from any charge whatever.

Whether the above contract amounts to sale of any goods delivered to Harrington in accordance with its terms and is a device under the guise of a consignment and agency to secure the appellant in the transactions, or whether it is a

consignment and not a sale in fact, are questions purely of law to be determined from an inspection of the contract itself as fully held in *Chickering v. Bastress*, 130 Ill. 206; *Murch v. Wright*, 46 Ill. 487.

It has often been held in this State as a guiding rule, as found in the following authorities, that "it is a settled rule that when the identical article delivered is to be restored in the same or an altered form, the contract is of bailment and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value or the money value, he becomes a debtor to make a return and the title to the property is changed; it is a sale." *Chickering v. Bastress*, *supra*; *Lonergan v. Stewart*, 55 Ill. 49 and authorities there cited; *Richardson v. Olmstead*, 74 Ill. 213. So in the case of *Chickering v. Bastress*, *supra*, the transaction was held to be a sale; but in that contract there was this provision, which is wholly wanting in the one recited above, viz: Under the contract in that case Pelton & Co. (the consignees of the pianos) were vested with the power and right of discharging themselves from any further obligations as respected all the pianos in any one invoice, by paying to the Chickering the negotiable promissory note given therefor, but which for the purpose of disguising the real nature of the contract was called an "advance." This was the main question and provision in the contract on which the decision of the case rested. There were some other terms of the agreement commented on in the Chickering case to be found in the contract in this case, such as, that the consignee had the right to sell at his own price, retaining the surplus as his commission, and was obliged to pay all charges of freight, etc.; but had it not been in connection with the other provision named we can not think that the court would have held it to have been a sale.

In the contract before us we find no provision that allows Harrington to take the wagons on his own account by paying for them. The nearest to such a provision is the condition found in the second clause of the contract, that appel-

Harrison v. Lenz.

lant might, at his option, after the expiration of twelve months from the date of the shipment, determine that the transaction should be a sale and Harrington be compelled to give his notes for the property consigned; but nowhere does Harrington have any option of the kind. Had such an one been given we have no doubt, under the authorities above cited, that the transaction would have been a sale.

We think, therefore, that the contract and transaction under it in delivering the wagons to Harrington did not amount to a sale, express or implied; by law it was a bailment.

If then it was a consignment, it made no difference whether the appellee had notice of appellant's claim to the property; he could get no right to it by the levy or otherwise. The condition of notice in appellant's refused instructions was unnecessary. The court below held as the law that the transaction was one of bailment; it ought then to have been consistent with the holding to have found for appellant. *Gray v. Agnew*, 95 Ill. 315.

Holding that the court below erred in finding there was a sale of the wagons to Harrington and in entering judgment against appellant, the judgment of the court below is reversed, and as the amount of the recovery is agreed on, and no question of fact to be settled by a jury, we render judgment in this court for the amount due in favor of appellant against appellee, to-wit, \$963, and the costs of this court and the court below.

Judgment reversed and judgment rendered here.

Finding of facts to be incorporated in the final judgment, as being different from those found by the court below and upon which the judgment of this court is based, viz:

“And the court finds that the defendant in the execution, T. L. Harrington, held the wagons and property in question, the basis of the judgment herein, as the agent and factor of appellant and held the same for sale as such, and that he, the said Harrington, was not at the time of the levy or any time before or after, the owner of the said property, but on

the contrary, the appellant was at the time of the said levy and sale the *bona fide* owner of the said property and had the right to the possession thereof as against the said execution creditors of Martin & Co., and as against the appellee, the said sheriff, and as against any other persons whomsoever. The above finding is based solely on the written contract between the said appellant and the said T. L. Harrington appearing in evidence, dated March 4, 1892, and is the result of the legal construction given to the same by this court; and it is further found that there is no other evidence tending to establish a sale of the said goods by said appellant to said Harrington; and we further find that the amount of the judgment herein is fixed by the evidence and agreement of the parties thereto appearing in the record."

T. F. STROUD
V.
MICHAEL MULCAHY.

Contracts.

In an action brought by a sub-contractor to recover for digging a ditch, it appearing that the work was not completed, a recovery being had for a sum much less than the price agreed upon, the defendant contending that the contract sued on being special, there could be no recovery on the common counts for the performance of a portion of the work only; and that to entitle the plaintiff to recover on a *quantum meruit* it was necessary to declare specially, this court declines to consider the point, it being raised herein for the first time, and holds that the affidavits filed in support of a motion for a new trial showing that one of the jurors was asleep during a portion of the trial and certain newly discovered testimony were not sufficient of themselves to warrant the court in setting aside the verdict.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Livingston County;
the Hon. C. R. STARR, Judge, presiding.

Stroud v. Mulcahy.

Mr. A. C. BALL, for appellant.

Mr. B. F. JONES, for appellee.

Per Curiam. This was an action of assumpsit by appellee to recover for digging a ditch for appellant. The work was done under a sub-contract taken from appellant who had contracted to construct certain ditches for the city of Pontiac.

The declaration contained only the common counts. Upon the trial appellee introduced a written contract whereby it was agreed that he should construct a ditch of certain depth and width 8,000 feet long, for which appellant was to pay him \$500. He testified that he completed the ditch according to contract in August, 1886. Appellant denied that appellee completed the ditch and showed by himself and other witnesses that he was compelled to do a great part of the work himself. There was a recovery for \$100.

The chief point of contention made by appellant is that the contract sued on being special, there could be no recovery on the common counts for the performance of a portion of the work only; that to entitle the plaintiff to a recovery on a *quantum meruit* it was necessary to declare specially. So far as the record discloses, this point is made for the first time here. Ample opportunity was afforded appellant to have this well settled rule of law presented to the jury in the form of an instruction.

We are disposed, therefore, to allow the judgment to stand, especially in view of the testimony of appellee that he completed the ditch in August, 1886.

The affidavits filed in support of the motion for a new trial showing that one of the jurors was asleep during a portion of the trial, and showing newly discovered testimony, were not sufficient of themselves to warrant the court in setting aside the verdict.

Judgment affirmed.

NATIONAL SYRUP COMPANY

v.

ALBERT CARLSON.

Master and Servant—Negligence of Former—Personal Injury—Un-railed Elevator Shaft—Release.

In an action brought by an employe to recover for personal injuries suffered in the course of his employment through falling into an unprotected elevator shaft, this court holds that the evidence supports a finding of negligence on the part of the defendant; that the release of damages obtained from the plaintiff on account of his injuries was not fairly obtained, and that the judgment in his favor can not be disturbed.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Winnebago County; the Hon. JOHN D. CRABTREE, Judge, presiding.

MESSRS. WALKER & EDDY and A. D. EARLY, for appellant.

MR. CHARLES A. WORKS, for appellee.

MR. JUSTICE CARTWRIGHT. This case was before this court on a former appeal, when the judgment was reversed on account of errors in giving instructions and in rulings on the admission of evidence. *National Syrup Co. v. Carlson*, 42 Ill. App. 178.

The case was reinstated in the Circuit Court and again tried. At the close of the evidence for the plaintiff, the defendant entered its motion to have the court direct a verdict for defendant. The motion was overruled and at the conclusion of all the evidence in the case, was renewed and again overruled. The defendant then asked the court to instruct the jury that the evidence was insufficient to maintain the plaintiff's cause of action charged in his declaration, and that their verdict should be for the defendant, but the court refused to so instruct the jury. No other instruction was

47	178
155s	210
47	178
186s	14
47	178
192s	1641

asked or given. A verdict for \$3,000 was returned, on which the court, after overruling a motion for a new trial, entered judgment and the defendant appealed.

The case now comes before us on the refusal of the Circuit Court to direct a verdict for appellant.

It is urged that the action of the court was wrong because the evidence adduced at the trial proved that appellee was not in the exercise of ordinary care for his own safety, and failed to prove that appellant owed him any duty which it omitted to perform, and because appellee had released the damages sued for.

The claim is that there was such a substantial failure of evidence tending to prove the cause of action charged in the declaration, or tending to invalidate the release signed by appellee, that no verdict for him could be suffered to stand, and that the direction should have been given. There were important differences between the testimony of appellee as given on the two trials; that given on the last trial being decidedly stronger for himself on the material matters of fact. He is a Swede, and there was some evidence tending to show that perhaps at the first trial he did not fully understand the questions put to him, or was not accurately understood. These differences were fully set before the jury, and his credibility was peculiarly for them and the judge who approved the verdict. They had much better opportunities for judging of his credibility than we have, and they evidently gave him credit. The evidence before the jury in his behalf tended to prove substantially the following facts: Appellee had worked in the glucose factory for a former proprietor, and had worked there for appellant since March, 1889. His work was on the second, third and fourth floors. Just before December 8, 1889, he had been working on the day gang, and on that day, which was Sunday, he changed to the night gang. The factory ran night and day, and one hundred and forty men were employed. He came to the factory on that Sunday noon with his dinner pail, and met the foreman, who said that they did not have steam then and could not start the presses, and told him to go home and

come back at nine o'clock that evening and help Mr. Swanson set the presses. As stated in the former opinion, there were two sets of stairs, the main stairway on the south side near the east end, and the other on the north side about the middle of the building. Each had successive flights above each other to the stories above. Appellee went up the south stairway to the second floor and crossed to the north stairway and went up to the fourth floor, where his working clothes and lantern were, and left his dinner pail. He then went home and at eight o'clock heard a whistle, which he supposed to be for the hands, and got his supper and went to the factory, where he arrived about nine o'clock. The factory was dark, but there were some employes in the building. He went up by the south stairway to the third floor, and there found his boss, Mr. Hade, and Mr. Swanson, whom he was to assist, and some person whom he could not distinguish who had a light near the east end of the room. He asked Hade if he had work for him and Hade replied that they had lots of work as soon as they were ready; that they had not got a light yet, and that he should go and change his clothes and get his lantern and look after the press cloths and get them ready. The factory was supplied with electric lighting apparatus, but was not then lighted. Running west from the south stairway, up which appellee had come, there were presses along the south wall. North of them and between them and the vacuum pans and pumps there was a passage way which ran west to and along the elevator which was its north boundary at the point where the elevator was located. West of the elevator the passage way turned north and ran across the floor to the north stairway, the elevator being in the angle. The elevator opening had posts at the corners into which a railing two by four inches was framed at the ends and fastened by nails as a protection around the hole in the floor. The railing on the south side along the passage way had been taken away that day, and the elevator let down into the basement to raise a large vacuum pan in sections. Appellant claims that the railing was off on Saturday, when appellee was at work about there,

and the testimony of Erickson, the carpenter, and Linholm, the steam fitter, is relied upon to prove it; but Erickson testified that he did not remember seeing it off Saturday, and Linholm said that he could not swear to it. Appellee testified that he did not see it off, and Arthur McCarthy, an employe who saw it off Sunday, did not remember seeing it off before. On Sunday evening when it was time to quit work for the day Erickson, the carpenter, told Frank Bowers, who had charge of the carpenters and millwrights, that the railing ought to be fixed, and Bowers told him to do it the first thing in the morning. A section of the vacuum pan and the jack with which it had been elevated, occupied the south part of the passage way. When appellee was told to get his clothes and lantern, he started along this passage way, and Swanson walked behind him. Appellee held out his hands to find the railing and walked into the open elevator hole and fell. The route taken was the one customarily traveled by appellee, and which he testified was the safest and best, usually. It is claimed that the railing was frequently off, but the evidence on the last trial does not justify the claim. The manner of its construction shows that it was not designed to be opened in the prosecution of the current business of the factory. If it had been so designed it would surely have been made to lift or swing or would be removable like a bar; but it was fastened permanently with nails, and was not intended to be taken out except as any other permanent structure might be removed in case of necessity. It was sometimes removed for the purpose of putting in new and heavy fixtures requiring such removal, when it was again permanently fastened to the posts by nailing.

There is no evidence that it had been off recently before the accident. On this occasion it was necessary to take the railing off, but it was left off at night when no longer necessary, after attention had been specially called to it and when employes were expected to resume work that night. No warning was given of its condition, and there was no light to show the danger at a time when appellee had been ordered to be there and when he and other employes were expected

to go to work. These facts were sufficient to support a finding of negligence on the part of appellant.

Appellee came to the factory in pursuance of orders. He found others there and found his boss, who told him to get his clothes and lantern. The factory was dark, and he was going to get his light so that he could see to get the cloths ready for the presses. He took the usual route along the passage way where a railing was usually in place, permanently attached to the posts, without any notice of its being away. We are not prepared to say that the jury could not rightfully find that he was in the exercise of ordinary care.

Appellee was confined with his injuries for some time, and appellant paid his wife on pay days amounts equal to what his wages would have been, and when he got out of the house and went to the factory, the paymaster gave him \$22.50, and took a release of damages on account of his injuries. There was no contradiction in the evidence as to the release. He could not read English and the release was not read to him, but he was led to believe that it was a paper to enable the paymaster to show where the money went. He was told that he should sign his name for the money and did so. The release was not fairly obtained, and did not operate to release the damages sued for.

The judgment will be affirmed.

Judgment affirmed.

CITY OF PEORIA

V.

THOMAS J. WALKER.

Municipal Corporations—Negligence—Personal Injuries—Excavation in Highway—Comparative Negligence.

1. A municipal corporation has the right to have gas and water pipes sunk in its streets, and to give permission for the sinking thereof, and in such case the city is only required to use ordinary care in notify-

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ing the public traveling on such streets of the true condition thereof, and if the public knows of such condition, or by the exercise of ordinary care could have known of it, the city is excusable for failure to give notice.

2. A person is negligent in placing himself in a position where by the frightening of his horses he will be in peril, particularly where there is a safer way open.

3. If ordinary prudence requires it, a municipality must construct barriers against teams and wagons falling into ditches being excavated in its streets, and it is a matter of fact for the jury in a given case to determine whether ordinary care required the city to guard against such accident as happened in such case.

4. When in a given case a jury has found facts upon which their verdict must necessarily be based, on insufficient evidence, and contrary to common reason and justice, it is the duty of this court upon appeal to set aside such verdict.

5. In an action brought to recover from a municipality for a personal injury alleged to have been occasioned through its negligence in connection with an excavation in one of its streets, this court holds that the plaintiff was negligent in driving upon that portion of the street in question, where he received his injury, and that the judgment in his favor can not stand.

6. There can be no recovery in such case where the plaintiff when injured was not exercising ordinary care.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Messrs. W. T. WHITING and JOHN W. CULBERTSON, for appellant.

Messrs. IRWIN & SLEMMONS, for appellee.

MR. JUSTICE LACEY. The appellee brought suit against the appellant in an action of case to recover damages for injuries to one of his feet, caused, as he alleged, in not keeping its streets in reasonable repair, by reason of which he was compelled to jump from his wagon, and by lighting with the hollow of his foot on a street car rail, injured it.

The cause was tried in the court below and there was recovery for \$1,100 by verdict of a jury and judgment, and

appeal taken from that court to this and reversal asked on several grounds, the most important of which is that the verdict is manifestly against the weight of the evidence and the court gave improper instructions for appellee and refused proper ones offered by appellant.

Adams street, in the city of Peoria, on the 11th of May, 1891, the day of the accident, and at the place where it occurred, was situated as to location and surroundings as follows, viz: Adams street being one of the main streets in the city, runs from a northeasterly to a southwesterly direction, and above where it intersects Franklin street, is sixty feet and below that point is fifty feet wide; at a certain point Franklin and Harrison streets cross it at certain angles, the last named street running north and south—Harrison street being east of Franklin street and 300 feet from it. Adams street runs in the same general direction with the Illinois river from the northeast to the southwest; and it is called up and down according to the flow of the river. There was an electric street railway in operation on Adams street on the day of the accident, and had been so for some time. The street car company had the right of way on the street fourteen feet wide, and was operating a double track on the street extending past the intersections of Franklin and Harrison streets.

By permission of the city, the gas company some time prior to the accident had been laying its service pipe in Adams street along and past its intersections with Franklin and Harrison streets and was so engaged on the said 11th day of May, the work having been suspended since the 4th day of May in order to give the water company, which by similar permission was laying its water pipe across Adams street, coming down from Franklin street, opportunity to lower its pipe so that the gas pipe could cross it on a level. Before the morning of the 11th May the water company had lowered its pipe and filled up the ditch under the railway tracks and from the tracks across the lower or river side of the street so that teams and wagons passing up and down the street could pass on the entire width of

the street between the lower part of the electric railway track and the lower curbstone of the street, except at the point opposite the place of accident two to three feet was obstructed by brick and gas pipe at the lower curbstone. On the lower side of Adams street between the curb line and the lower rail of the street car track there was a space of twenty-two feet, less the two or three feet obstructed by the brick being against the lower curbstone, which the evidence showed gave ample room for public travel with wagons and teams, and for the passing of such moving in opposite directions.

On the morning of the 11th of May, the day of the accident, there was a large excavation at the intersection of Franklin and Adams streets, running from a point below the intersection of the streets along up and parallel with the north rail of the north track of the street car company to a point half way between Franklin and Harrison streets, about 155 feet. The depth of the ditch was from eighteen inches at the northeast end to three feet ten inches at the point where the accident occurred. The margin of this ditch was about eighteen inches to two feet distant from the upper rail of the street railway track, and the center of the ditch about four feet, and the ditch about four feet wide. This ditch was the gas company's ditch. At the point where the water company's ditch crossed the gas company's ditch at right angles, on account of the sandy nature of the soil and two excavations crossing each other, it made a hole of seven or eight feet wide. This excavation started close to the track but underneath it; the ditch had been filled up but had sunk a little, from six to ten inches, but it appears from the evidence to have been perfectly safe to cross, as teams had been crossing it on the electric railroad tracks for a day or two without difficulty. The crossing of the two ditches was just below or very nearly opposite where the accident occurred.

On the morning of the day of the accident, the appellee, who is a cooper, residing and doing business about ten blocks northeast of the place of the accident, and who was deliver-

ing barrels about the same distance southwest from such place of accident, and Adams street being the nearest traveled route between where the barrels were made and where they were to be delivered, undertook to deliver a load of barrels, and as the evidence shows, on the morning of the accident he started, with his team hitched to a wagon, with a barrel rack on loaded with eighty barrels, to deliver, and passed down Adams street, going toward the southwest; and came along down the street past the gas company's trench, and instead of taking the lower side of the street below the railway track, he got on the upper track, with his wagon wheels inside the flanges, and was proceeding down in that way in a fast trot as some of the witnesses say, or in a fast walk or trot as he says, in his testimony, and sitting up on his load, some eight feet high from the ground, and when he reached the point where the water company's ditch crossed the gas ditch (near the corner of Franklin and Adams streets) as he testifies, "there seemed to be a lowering in the track; it probably had been excavated and filled in and settled a little, and either that or the hole on the right hand side of the track scared the horses and they shied from it, and as they shied, I (appellee) straightened up the lines to keep them in the track and in some manner or form it threw the right hind wheel over the track. * * * When the wheel went over the track I thought the whole load, horses and all, were going to tip over there and I jumped to this side of the rack and jumped off and at the same time I pulled the horses around so as the other wheel was over, and the horses pulled it out. In jumping off I lit on the street car rail in the hollow of my foot."

He called a physician and the injury was quite severe and laid him up for three months, and at the time of trial the wound still pained him.

Another witness, Frank Prince, who was at work on a building close by, and was entirely disinterested, tells a different story as to the manner of the accident. He says, the first that attracted his attention to the team, as it was coming down the street, "I saw Walker, whom I know by

sight; I heard him halloo whoa, and he was pulling on the lines and then he jumped; and when he jumped he fell back and pulled the lines pretty tight as he fell. The wagon slipped I should think six feet on the car track; it did not tip before Walker jumped but very little, because it would take a very little tip to throw off the barrels. He turned the horses to the left; they were not pulled to the right again; they were pulled right backwards. There was a street car coming on the other track at the time the horses were pulled back; at the time Walker struck the iron rail the car was probably ten or fifteen feet from them. When he first pulled the horses to the left the car was near the middle of the block from them, 100 to 150 feet. I noticed the horses scared at the cars; the black one (the black mare) saw the cars a good ways off. I know the black mare and know her disposition; she was very scared of street cars; I have driven the mare along Adams street along the car line. She was nervous and skittish, scared at most anything."

Robert Sarmis, also testified, that he was in the livery business; before that was bookkeeper for Griswald & Co., and appellee delivered barrels to the firm for several years, and was acquainted with the team. "The black mare was nervous and would shy at most any thing, etc. Walker tried to sell the mare to him in fall of 1891, and he objected to her on that account, 'too flighty and nervous for livery stable use.' Walker then claimed she was all right; but witness had noticed her when he was unloading barrels, 'and she would not stand well and was nervous and had to be watched.' Walker seemed to think she was not to be trusted.' Walker said at the time 'he didn't think there was any thing wrong, but it was best to watch her,' * * * that the mare was nervous."

Charles E. Anderson, who stood opposite where the accident happened, called by appellee, testified, that "Walker came down until he got close to the excavation and then for some reason he went to turn out; and as he went to turn out the left hind wheel caught on the lower side of the track on the upper flange and the right wheel on the upper rail

and the wheels slid for six or eight feet, and when the wheels began to slide he got over on the left side of the wagon and jumped." The witness testified in substance that the right-hand front wheel went into the ditch, but he jumped just before the wheel went over; and further says the "appellee could have driven down in the track if the car had not approached. There was nothing to prevent Walker from driving on the lower side of the street between the lower track and lower curb stone. * * * One of the horses was frightened. I can't tell whether at the depression in the street or street car. * * * The horses were coming along, feeling good, full of life, a good lively team."

It is true appellee testified his horses were not afraid of the cars and one other of his witnesses corroborates him.

But we feel satisfied from an overwhelming weight of the evidence that the black mare was nervous and easily frightened, and that appellee well knew it and that she was not to be trusted in a critical or dangerous place.

The evidence discloses that all suitable barriers and signals were kept in place by the gas company and water company to prevent accident during the night time, but as no questions arise making the notice of such proof necessary, and no injury was received during the night, we need not notice or disclose them. The appellant relied on the fact that the excavations and embankments of defendant were in plain view, and that men were at work in the ditches and on the ditching work, as a sufficient warning for all passers, if in the exercise of ordinary care, of the presence of the ditches and embankments complained of in the declaration. And the appellee admits in his testimony that the first he knew of the excavation he was probably 100 feet from it, but was not a great ways from the hole when he noticed it was so large. And it can not be denied that a man using ordinary care, being elevated eight or ten feet from the ground on a wagon, with nothing to obstruct the view, could have easily seen the ditch dug by the gas company as well as the one by the water company, while coming down

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the street car track in the manner appellee did. Then he should be held to all the notice a reasonable caution would have given him, but such notice would impose on appellee corresponding great care and caution in the presence of such dangerous situation to avoid accident; and it *should not* be required for a city to station policemen to watch passers by of a danger in plain view.

The appellants, it is not denied, had a right to have those pipes sunk in the streets, and to give the permission it did to the gas and water companies to sink them. The excavations were, then, a lawful act and the city was only required to exercise ordinary care in notifying the public traveling on the street of the true condition of the streets, and if the public knew of the condition of the streets, or by the exercise of ordinary care could have known of it, then the city would be excused for any failure to give notice. It seems to us that the gas and water companies, and the city, which was responsible for the manner in which the work was done, used all the care a reasonable prudence would require. It sufficiently appears, all the evidence considered, that appellee was himself directly responsible on account of his own negligence for the accident. As a citizen, he must have known that the street cars were passing at intervals at the time and that the ditch excavated by the gas company was to his right, for he could see it from his elevated position on the wagon, and that it was so close he could not turn to the right, and that if he went along that track he was liable to be hemmed in with his big wide load of barrels, drawn by a fractious team, between the ditch on the one side and the passing electric car on the other. This, as a reasonably prudent man, he ought to have anticipated and guarded against. And we are not surprised that when he saw the street car coming a half a block away on the lower track, he would try to escape to the lower side of the street. We are aware he denies seeing it, but we are quite well satisfied from the other evidence he did. But whether he did or not it is immaterial; his horses became frightened at something, and this he might reasonably anticipate from the

position he placed himself in. He ought not to have placed himself in a position where, by the frightening of his horses, he would be in peril, and more especially where there was a safer way open.

The small depression in the street under the railroad track was not dangerous in itself and was not alleged as the cause of the accident, even if it frightened the horses, which we think the evidence fails to establish. The cause of action, as submitted to the jury in the appellant's instructions, was the excavation on the upper side of the railroad track, to escape the danger of falling into which appellee jumped from the wagon, and the failure to protect the same by barriers. A barrier, if strong enough, might be as dangerous to a team running away in the streets as the ditch without one. With proper care on the part of appellee under the circumstances we see no need of any barrier along the lower side of the ditch, and considering its close proximity to the car track, we do not see how one could be made without interfering with the passing cars.

It can not be denied that if ordinary prudence required it, the city would be bound to construct barriers against teams and wagons falling into the ditches being excavated, and that it is a matter of fact for a jury to determine whether ordinary care required it in the present case to guard against such accidents as happened to appellee. While this is the law, such finding by a jury is not final and is subject to review and correction, if erroneous, by this court, which is the final tribunal with power to pass upon such facts. When we find in any case a jury has found facts upon which their verdict must necessarily be based on insufficient evidence, and contrary to common reason and justice, it is our duty to interfere and set aside such verdict. We can not but feel that the jury in passing on the facts of the case has entirely misapprehended the force and weight of the testimony and has given a verdict contrary to its manifest weight.

The evidence in the case is not materially conflicting. In viewing the case from the standpoint of the appellant,

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to allow the excavations in question to be made, the consideration would naturally arise whether barriers should be put up of sufficient strength to prevent teams passing down the streets in the day time from falling into the ditches. The city authorities would not only think that such an extreme precaution would not be necessary; for the ditches were in plain sight and a reasonable prudence would require that teams should keep far enough away to prevent accident, more especially as there was plenty of such room for the passage of teams in perfect safety, and it could not be possible that a prudent man would undertake to drive in the upper street car track and subject himself to be hemmed in by a car passing in the opposite direction and a deep ditch; or to other dangers by frightening of his team otherwise of being thrown into the ditch. And even in case of a barrier, unless it were a wonderfully strong structure, such an accident could not be avoided. It appears to us that the appellant, and the gas and water companies did all in the way of preventing the kind of accident that happened in this case that it or they need have done. If that be so, and there was not negligence on the part of the city or those for whose acts it was responsible, there can be no recovery. And even if it could be cause of complaint that the excavations were allowed to remain too long, of which there is no sufficient evidence, the case would not be changed.

It is a well settled rule of law, as said by Lord Ellenborough, *Butterfield v. Foster*, 11 East, 60, that "a party is not to cast himself upon an obstruction which has been made by the default of another and avail himself of it, if he do not use common and ordinary caution, to be in the right."

On the other hand, the evidence, as it appears to us, clearly shows that the appellee was himself guilty of great negligence and want of due care in not taking the lower half of the street, which there is no question he could easily have done and prevented accident. Instead, he came down the street on a trot, with the ditch on his right in plain view and the street cars running on the left track, liable to be caught at any moment between the car and the ditch, or by

the scare of a skittish and fractious team, be thrown into the ditch. If the appellee had made out as good a case of negligence against the appellant as the evidence shows against him we would not hesitate a moment to affirm the judgment. We see no sufficient reason for holding the city responsible for this accident. If any one was to blame it was appellee himself, much more so than the appellant. We feel entirely unwilling to sustain a verdict on such insufficient evidence. It would be natural that the appellee would desire to go on the car track with his load as it was hard and smooth and much easier to draw a load on; but this could be no excuse for taking unnecessary risks, as was done.

The appellant objects to the second, fifth, sixth and eighth of appellee's instructions. As we must reverse the judgment on the facts, it is not absolutely necessary that we notice the instructions, but we will do so to some extent, as the questions raised are important.

We see no particular objection to the fifth instruction given for appellee. It appears to announce the law correctly. The sixth also seems to be in due form; also the eighth appears to be correct. The second instruction given for appellee is as follows, viz:

"2. The court instructs the jury, that while a person is bound to use reasonable care to avoid injury, he is not held to the highest degree of care and prudence of which the human mind is capable; and to authorize a recovery for an injury, he need not be wholly free from negligence, provided his negligence is but slight and consistent with such slight acts of negligence as an ordinary prudent and cautious man would be guilty of under the same circumstances."

This instruction, we think, was not needed in the case, and while to an educated mind, one that can comprehend the effect and meaning of all the decisions made by our Supreme Court on the doctrine of comparative negligence, it may not appear illogical and unreasonable, yet, to a jury it would probably be incomprehensible and tend greatly to puzzle rather than enlighten it. Why set a jury to settle the greatly mooted question of what slight negligence con-

sists, or what the proper definition of the term is, when courts of high authority have labored for years to define it and the question is still unsettled?

The court, in the instruction, says it is such slight acts of negligence as an "ordinary prudent and cautious man would be guilty of, under the same circumstances." If that be the proper definition there would be no negligence whatever in a legal sense of the term, if the appellee were in the exercise of ordinary care, which, by the instruction he must be, to entitle him to recover. The instruction then that to entitle the appellee to recover, he must have been in the exercise of ordinary care, such as an ordinary prudent person would have exercised under the circumstances, was all that was needed and that without that, he could not recover, unless the injury was wilfully inflicted. Then with those given instructions it were futile to set the jury to speculating on the problem of slight negligence. Then again the Supreme Court has often held it to be error to submit the question of comparative negligence to the jury in any other form than that the plaintiff's negligence shall be slight in comparison to the negligence of the defendant which must be gross. *C. B. & Q. R. R. Co. v. Harwood*, 90 Ills. 425; *Ill. C. R. R. Co. v. Hammer*, 72 Ill. 347, and many earlier and later cases might be cited.

But great difficulty has arisen on account of subsequent decisions of the Supreme Court in finding a case where the doctrine of comparative negligence can be applied, and in fact it would seem impossible to find such an one in view of the conclusive determination in the cases of the *C. B. & Q. Ry. Co. v. Johnson*, 103 Ill. 512; and *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358; the opinion in both cases being written by Judge Scholfeld. In the former case the following proviso was added to four different instructions primarily basing the right of Johnson to recover on the exercise of care on his part and the want of it on the defendant's part, to wit: "But if from all the evidence it shall appear that Johnson was not exercising ordinary care, yet the plaintiff may recover if Johnson's negligence was slight

and that of defendant was gross in comparison with each other, and the verdict must be for the plaintiff." The court below gave the instructions with the proviso to the jury.

The court reversed the judgment of the Appellate and Circuit Courts on account of the giving of those instructions with the above qualification added, and most emphatically held that in such case, where there was want of ordinary care on the plaintiff's part, it conclusively implied more than slight negligence on his part; it was "ordinary negligence."

The court refers then to legal definitions of slight negligence and ordinary negligence or want of ordinary care and says "it must of course be understood the terms 'slight negligence,' and 'gross negligence' are used in their legal sense as defined by common law writers." * * * And Story says "he who is only less diligent than very careful men can not be said to be more than slightly inattentive." He who omits ordinary care is a little more negligent than men ordinarily are, and he who omits even slight diligence fails in the lowest degree of prudence and is grossly negligent. The court then follows with this language: "It can not then legally be true that where the plaintiff fails to exercise ordinary care, and the defendant is guilty of negligence only, the plaintiff's negligence is slight and that of the defendant gross in comparison with each other;" meaning where the defendant did not commit the injury wilfully. In other words, it was held that the conditions of the portion of the instructions referred to were a contradiction in terms, and the conditions could not exist together, one being guilty of the want of ordinary care and at the same time only guilty of slight negligence.

Of course, then, logically there could be no application of the doctrine of comparative negligence where the plaintiff was not in the exercise of ordinary care. And we understand the Supreme Court in a late decision has held this language. Pullman Palace Car Co. v. Laac, 32 N. E. Rep. 239. It was said in the Johnson case above, and more care-

fully and explicitly affirmed in *Calumet Iron and Steel Co. v. Martin*, *supra*, that in order to entitle a plaintiff to recover in such cases he must show that he was in the exercise of ordinary care, and that no exception existed to this rule. It was a *sine qua non*, unless perhaps the injury is committed wilfully. If then a plaintiff may recover when he is, and must be, in the exercise of ordinary care, and the defendant is not in such exercise, he apparently has no need whatever to invoke the doctrine of comparative negligence, and take upon himself the burden of showing that his negligence was slight and that defendant's was gross in comparison with it, which is held in the Johnson case to be a greater degree of negligence than the want of ordinary care, and if the failure to exercise ordinary care is gross negligence, such an instruction would have no meaning whatever; for in that event the measure of the defendant's negligence must be the same, whether the plaintiff is guilty of slight negligences or is in the exercise of ordinary care; and a further absurdity, the plaintiff would be excused from the exercise of ordinary care.

It is still more grievous if such an instruction be given for the defendant; that is, in case plaintiff is guilty of slight negligence, which he may be, and at the same time be in the exercise of ordinary care, as we have above seen; he should then be compelled to show that defendant was guilty of gross negligence (a supposed higher degree than want of ordinary care, in comparison), when in fact, according to another rule of law, if he is in the exercise of due care, he only has to show that the defendant was not in its exercise. An instruction that can not be given on either side would seem to be vicious, yet in *Calumet Iron & Steel Co. v. Martin*, *supra*, the court seems to sanction the giving such an instruction by either party and says "such an instruction might, without impropriety, have been given." It was not "indispensable."

In establishing the doctrine originally of comparative negligence the idea seemed to prevail that where as a rule the plaintiff could not recover on account of a slight want

of ordinary care on his part he might be excused by showing that in comparison with his slight want of due care (slight negligence it was termed) the defendant was grossly negligent; thus giving him a right to recover. If we interpret this term, slight negligence, to mean a slight want of care greater than an ordinary prudent person would be guilty of under the circumstances, then the doctrine would have practicable application and would be of great benefit to a party situate as above supposed. Of course, as it stated in the *Calumet Iron & Steel Co. v. Martin*, above, with a long list of Supreme Court decisions cited in support, it had often been decided, that as a condition of recovery the plaintiff must show that he was in the exercise of ordinary care. But as the court always adhered to the doctrine of comparative negligence, would it not be reasonable to suppose that it regarded the latter as an exception? The law, however, seems latterly to be finally established against any exception to the rule prohibiting a recovery without the due exercise of ordinary care, and we regard it as a great improvement, as being the more plain and simple.

The comparison of the plaintiff's slight negligence under any meaning of the term with the gross negligence of the defendant opened a wide field for speculation and conjecture, and gave the jury almost unlimited power to give the plaintiff a verdict in any kind of a case. And juries in a large class of cases were found to take ready advantage of the rule. But now without any comparative negligence doctrine the law is plain and simple. With the rule that the plaintiff must be in the exercise of that care that an ordinary prudent person would use, and the defendant the same, it would seem that the doctrine could have no intelligent application, and that it would be mischievous and erroneous to base an instruction upon it.

As long as such practice is followed, juries will give instructions a practicable application, which according to the law, as now held, would be detrimental to one or the other of the parties.

We do not wish to hold, in the absence of a decision of

Ross v. Smith.

the Supreme Court, that the giving of an instruction on the doctrine of comparative negligence in the prescribed form would be error, but we would condemn, as the Supreme Court has done, one not in accordance with the law in that respect.

The judgment is reversed and the cause remanded.

WILLIAM P. ROSS, EXECUTOR,

V.

NELLIE E. SMITH ET AL.

Administration—Secs. 59, 74 and 76, Chap. 3, R. S.—Widow's Award—Life Estate.

Upon a claim filed against the estate of a widow for a sum received by her from the administrator of her husband's estate, her said husband having left a will wherein she was given the use of his personal property for life, the sum in question being less than she was entitled to as widow's award, and it being argued that in view of the wording of the receipt given by her, she and her legal representatives were estopped from claiming the money to be her own, this court construes such receipt and holds that the money in question became the sole and exclusive property of said widow, and that claimants failed to show any right thereto.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding.

Mr. C. L. SHELDON, for appellant.

Mr. J. W. WHITE, for appellees.

MR. JUSTICE CARTWRIGHT. By the will of Luman A. Sanford, deceased, the use of his personal property was given to his widow, Guley E. Sanford, for her life, but the princi-

pal was not to be used or disposed of by her, and was to go to his children after her death.

The estate was settled by an administrator, with the will annexed. The only personal property inventoried consisted of certain notes, which, when collected, amounted to \$793.15, and the testator left none of the articles of personal property enumerated in the statute which pass to a widow as her sole and exclusive property under the name of the widow's award. No appraisers were appointed, nor were any formal proceedings had concerning an award. Upon final settlement the administrator asked to be credited with sundry items amounting to \$528.99, and stated a balance due Guley E. Sanford of \$264.16, for the payment of which the court was asked to make an order. The report of the administrator was approved, and he afterward paid to said widow the said balance and took from her a receipt as follows:

"\$264.16.

STERLING, Ills., May 7th, 1886.

Received from A. A. Wolfersperger, administrator of the estate of L. A. Sanford, deceased, \$264.16, amount due me in full in the estate of L. A. Sanford, deceased, under the will annexed, and in lieu of widow's award.

GULEY E. SANFORD."

The widow afterward died, and by her will all her property was bequeathed to her son, William P. Ross. Appellees, who are children of Luman A. Sanford, filed in the County Court a claim against the estate of said widow for said sum of \$264.16, on the ground that it constituted the principal sum of which she had the life use only, and which passed to them at her death. The claim was allowed by the County Court. On appeal to the Circuit Court the cause was tried without a jury, and the foregoing facts appearing, together with a stipulation that said widow paid funeral expenses of Luman A. Sanford, amounting to \$82.90, the claim was again allowed by the court.

By the statute the widow was allowed as her sole and exclusive property forever the articles mentioned therein, or, in lieu of such articles an amount of money equal to the

personal property exempt from execution or attachment against the head of a family residing with the same; and if the administrator should discover that the assets did not exceed the widow's allowance after deducting necessary expenses, she would be entitled to receive it subject only to payment of the funeral expenses of the deceased. Secs. 59 and 74, Chap. 3, R. S.

Although no appraisers were appointed, the award could in no event be less than \$400, which was the amount of personal exemptions allowed to the head of a family residing with the same, and there being no articles of personal property the title to which would have vested in the widow by virtue of the statute, no affirmative action was required of her to give notice that she did not choose to take articles which had no existence.

Nor could her right to such award be affected by failing to renounce the benefit of the provisions of the will or otherwise. Section 76, Chapter 3, R. S.; *Deltzer v. Scheuster*, 37 Ill. 301. She became entitled to take \$400, and it was ascertained that the assets of the estate, according to the report approved by the County Court, amounted to less than that sum. She had paid the funeral expenses and had not been reimbursed. We discover nothing that could estop her or her legal representative from claiming that the money was received as her own. It is argued that the receipt given had that effect, and that she thereby acknowledged that she received the money as a bequest made to her in the will and waived her right to claim it in lieu of the articles enumerated in the statute as a widow's award. Whether any receipt could operate as an estoppel under the circumstances or not, the language upon which the argument is founded does not seem to justify that conclusion. There was no will annexed to the receipt and the words "under the will annexed" had no meaning unless they were intended to refer to the character of the legal representative who was administrator with the will annexed. As they might refer to him and could apply to nothing else, it would seem most rational to conclude that such was the intention. The words

“in lieu of widow’s award” are consistent with the receipt of the money in lieu of articles of personal property known as the widow’s award. The language of the statute is that such property shall be known as the widow’s award and that in lieu thereof she may receive money. If she took the money as her own she took it in lieu of property known as an award.

We think that the money became her sole and exclusive property, and that appellees failed to prove their claim to it. The judgment will be reversed and the cause remanded.

Reversed and remanded.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY
v.

JOHN H. ALSDURF, ADMINISTRATOR.

Master and Servant—Railroads—Negligence—Injury to Employe.

1. When a defendant offers evidence and proceeds with the case, after the overruling of a motion on his part, made at the close of the plaintiff’s evidence, to direct a verdict for the defendant, the propriety of such refusal can not be raised upon appeal.

2. In the absence of any agreement a railroad company is not bound to furnish any better side tracks than such as are in general use, and it is proper in personal injury cases, where injuries are alleged to have occurred through defective side tracks, to admit evidence going to show that the tracks in question were constructed and kept in the usual and customary manner.

3. Railroad brakemen must be held to understand the ordinary hazards attending their employment and to voluntarily take upon themselves those hazards when they enter upon their duties.

4. The law will imply, in a given case, notice upon the part of a servant of those things which it was his duty to observe and with which he had ample opportunity to become acquainted.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Grundy County; the
Hon. CHARLES BLANCHARD, Judge, presiding.

47	200
58	579
47	200
68	150

Mr. S. C. STOUGH, for appellant.

Mr. E. L. CLOVER, for appellee.

MR. JUSTICE CARTWRIGHT. This is a suit by appellee as administrator of Eugene C. Judd to recover damages on account of the death of said Judd, who was killed at Mazon, Illinois, while in the employ of appellant, as brakeman on a freight train. It was charged in the declaration that while deceased was in the performance of his duty he was run over and killed because of negligence of appellant in not keeping the spaces between the ties filled with gravel, cinders or other material in the side track where the accident occurred, and in keeping old rails on said track on which there were iron slivers. There was a trial and appellee recovered \$3,500.

At the close of appellee's evidence appellant made a motion to exclude such evidence and direct a verdict for appellant. The motion was overruled, but appellant did not stand by it, and proceeded to offer evidence in its own behalf upon the issues before the jury, and did not afterward renew the motion. It is now urged that the ruling was wrong, but appellant is not in a position to raise that question. *J. A. & N. Ry. Co. v. Velie*, 140 Ill. 59.

The circumstances under which Judd lost his life, as proved on the trial, were as follows: On November 12, 1890, he was one of a freight train crew consisting of Fremont Miller, conductor; Edward Rhoads, engineer; Fred. Cornell, fireman, and Eugene C. Judd, head brakeman, and John F. Beard, rear brakeman. The train arrived at Mazon from the East between seven and eight o'clock in the evening and went on the passing track to let the mail train by. There were four cars standing together on the east end of the side track south of the passing track, and the freight train was to take out the east three cars, leaving the west car on the side track. It was quite dark. Judd went to the night operator and got the bills for the three cars to be taken out, and the operator pointed out where the cars were.

Judd uncoupled the engine, and it came back on the main track and went in on the passing track to the rear of the train, and after taking up the way car and a coal car in front of it, stood there until the mail train passed. It then drew them back and went in on the side track, pushing the coal car and way car in front of it, for the purpose of coupling on the three cars and pulling them out. John F. Beard, the rear brakeman, was controlling the movements of the engine by signals with his lantern, according to the custom, and he was on the south side of the engine and cars. The three cars to be taken out were coupled together, but whether they were coupled to the fourth car does not appear. The first knowledge that any person had of Judd after the coupling on of the way car and coal car on the passing track was that he was found dead under the west car of the three that were to be taken out, the west trucks on the north side of that car having passed over him. His lantern was setting on the ground north of the car and it was evident that he had gone from the north side between the third and fourth cars for some purpose, and the car being pushed forward, the trucks ran over him. No one knew that he was between the cars, and he had given no signal that he intended to go there. There was evidence that there was a splinter on the north rail about where he lay in which was found a scrap of cloth, but there was no evidence that the cloth corresponded with or was any part of any clothing worn by him. The side track had been there for seventeen years, and there had been no change in it at the place where the accident occurred for several years. West of that point it had been recently moved and replaced in substantially the same condition as before, but that had no connection with the accident. The spaces between the ties were filled with dirt in the center of the track level with the tops of the ties, but the dirt receded from the center to the ends of the ties, so that there was no ballast or filling at the outer ends of the ties. This condition of the side track was proven in support of a charge of negligence made in the declaration, and appellant then

sought to prove, by witnesses who were acquainted with the usual and customary manner of constructing side tracks in this country and the general standard of such construction on well managed railroads, that the side track in question was constructed in such usual and customary manner and according to such standard. It was proposed to prove that side tracks generally in this country were constructed in the same manner and kept in the same condition as this one in respect to having the spaces filled between the ends of the ties. This proof was rejected by the court, and it is claimed that the only right appellant had was to furnish the jury with a description of the side track, and that it became the exclusive province of the jury to decide from such description, without any further aid, whether it was such a side track as should have been built and maintained, and whether appellant had been guilty of a failure in its duty toward deceased in not constructing and maintaining it in a different manner.

We think that the proffered evidence was competent. In the absence of any agreement, appellant was not bound to furnish a better track than such as were in general use, or to furnish such a track as the jury might rightfully regard as safer than the customary one. The deceased must be held to have understood the ordinary hazards attending his employment as a brakeman and to have voluntarily taken upon himself those hazards when he entered appellant's employment. Hazards arising out of the usual and general methods of construction on well managed railroads of the side tracks upon which brakemen perform their duties, must be considered as ordinary and incidental to the business generally and therefore as being generally assumed, by the contract of employment.

Appellant asked the court to give to the jury in the fifth instruction on its behalf the rule of law that if the condition of the track was open and notorious, and that deceased, prior to the accident, had ample opportunity to become acquainted with its condition, then the law would charge him with such knowledge. The court modified the instruction so as to

require proof of absolute knowledge on the part of deceased of such condition in order to charge him with notice. The evidence was that he had been a baggageman and brakeman for six years; that he had been a brakeman on this road for three months and that he had worked recently as brakeman on a gravel train ballasting the track in that vicinity and during that employment had often been on and about the side track. The law would imply notice of those things which it was his duty to observe, and with which he had ample opportunity to become acquainted. There was evidence on which to base the instruction and it stated the rule on the subject of notice as laid down in *I., B. & W. R. R. Co. v. Flanigan*, 77 Ill. 365; *C. & E. I. R. R. Co. v. Geary*, 110 Ill. 383; *Wharton on Negligence*, Sec. 214. It should have been given as asked. The deceased was clearly chargeable with notice of the manner in which the side track was constructed and ballasted.

From all the facts proven on the trial the conclusion is forced upon us that the death of Judd was due to his own negligence. To go between the cars in the dark during the switching operation without the knowledge of the engineer and without a signal or any precaution, and that, too, from the opposite side of the train from the one where the signals were being given, where he was not able to see what they were so as to know what movements would be made, was so palpably dangerous that it could only be done with the greatest risk to himself of losing his life. He had a right to give signals and to control the engine and should have done so if he desired to go between the cars. It was undeniably both unnecessary and dangerous for him to do as he did. It was a risk not required of him, and the conclusion can not be escaped that he was not in the exercise of ordinary care for his own safety, and that his administrator was not entitled to recover damages for his death. The judgment will be reversed and the cause remanded.

Reversed and remanded.

Dexter v. Heaghney.

JOHN DEXTER
V.
THOMAS HEAGHNEY.

Trespass—Cattle—Fences—Chap. 54, R. S.—Replevin.

A person having the legal remedy in his hands to enforce a given right, has no authority to take the remedy into his own hands and compel compliance by destroying or threatening to destroy the property of another.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Stark County; the Hon. N. E. WORTHINGTON, Judge, presiding.

Mr. M. SHALLENBERGER, for appellant.

Messrs. C. C. WILSON and FRANK THOMAS, for appellee.

Mr. JUSTICE LACEY. The appellant was the owner of land in Valley township, Stark county, Illinois, being N. W. $\frac{1}{4}$ Sec. 23, and the appellee owned eighty acres adjoining his on the south. The plaintiff, the present appellant, bought his land in March, 1891. Prior to the time appellant bought his land, appellee had occupied it as a pasture; was the tenant of appellant's grantor and put the fences up that were there and took them away about two months after appellant purchased the land, after having notice to do so by appellant; after that appellant's land laid open to the commons, and he did not do anything toward enclosing it till 1892. He then asked permission to join fences with appellee, which was refused by the latter. The appellee had made a ditch on his north line and wanted appellant to make an entire east and west fence in order to protect his ditch. The appellant then enclosed his land on the east, west and north, but did not quite join with appellee at his

north and south lines. The appellant left a small space of two or three feet, but so cattle could not get through. At the time of the survey the appellant asked appellee to designate the part of the east and west fence that the appellant should build, which he offered to do, but appellee refused. The line fence was poor, down in places, and admittedly insufficient to turn stock.

The appellant then turned in horses and cattle, which he had taken to pasture, on his own land, knowing the appellee had grain on his land only protected by this insufficient fence.

The cattle and horses, as might have been expected, went over the line into appellee's grain fields and did damages to him. He distrained the stock and notified appellant to pay damages and take them away. This appellant refused to do and replevied the stock, a number of head of horses and cattle. On this state of facts the case was tried by the court and a jury and resulted in a verdict for appellee. There can be no complaint of improper instructions, as none have been abstracted, but it is insisted that on the admitted facts the appellant should recover.

The defendant's (appellee's) right to take the appellant's animals damage feasant, is regulated by statute, which reads as follows: "If any such animal or animals shall break into an enclosure surrounded by a fence of the height and sufficiency described by this act, or shall be unlawfully on the premises of another, the owner or occupant of such enclosure or premises may take into possession such animal or animals and keep the same until damages, with reasonable charges for keeping and feeding, and all costs of suit be paid." Sec. 21 Chap. 54 R. S., on subject of fences.

The insistance of appellant is that the animals were not on appellee's premises unlawfully; that inasmuch as he refused to allow appellant to join fences with him, or to make any portion of the cross fence, the latter had a right to turn his cattle in on his own land without regard to the danger to appellee's crops by his cattle, which had nothing to prevent their doing damage except the wholly insufficient fence.

Dexter v. Heaghey.

Had the appellant any right to enforce the submission of appellee to his demands to join fences and to make one-half the partition fence by turning his live stock in on his corn or doing what was equivalent to it, putting them into his own pasture, where there was nothing to hinder them from going into appellee's grain fields? The statute gives the appellee the right to compel a proper settlement of a dispute like this one and to compel appellee to build his half of the partition fence. In this case he insisted appellant should build the entire fence. If appellant had pursued the remedy given him by Chap. 54 R. S., and especially sections 4, 5, 7, 8, 9, 10 and 11, he could have compelled the appellee to build his half of the fence, and in his failure appellant could have built the entire fence and recovered the costs of building appellee's half, as fixed and determined by the fence owners. Having this legal remedy in his hands, the policy of the law would not permit him to take the remedy into his own hands and compel compliance by destroying or threatening to destroy appellee's crops. Such a course could not be tolerated where the law gave him a peaceful and adequate remedy. If the appellant had not joined fences with appellee in such a manner as to make the line of fence in dispute a partition or division fence then both appellant's and appellee's lands were being open and the domestic animals of appellant were running at large contrary to statute law, and the stock distrained would be unlawfully on appellee's premises and liable to distraint. The evidence shows damages to some extent to appellee's crops by appellant's stock and that the former fed the distrained stock for at least two days before it was replevied; yet nothing was tendered for such damages and expenses before the suit was brought. We see no error in the verdict of the jury or any portion of the record.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

47 208
91 425CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY

V.

WILLIAM A. MAHARA.

Railroads—Negligence—Personal Injuries—Improper Platform—Contributory Negligence.

1. To build a depot platform in such manner between tracks as to compel a passenger to stand dangerously near a train is negligence, for which a company is liable in case of injury; but where such platform is of sufficient width to afford plenty of room for safety, it is not negligence to so build it that the nearest edge to the track could not be occupied in safety as a standing place while a train is passing.

2. Ordinary prudence requires that a person standing on such platform, waiting for a train, should give reasonable attention to his surroundings. He can not recover where he becomes so abstracted in thought as to be oblivious to his surroundings and is thereby injured.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Bureau County; the
HON. GEORGE W. STIPP, Judge, presiding.

Messrs. O. F. PRICE and OWEN G. LOVEJOY, for appellant.

Mr. EDWARD R. WOODLE, for appellee.

Mr. JUSTICE CARTWRIGHT. Appellee brought this suit against appellant to recover damages on account of personal injuries sustained when about to take a train as a passenger from Princeton to Kewanee, and obtained a verdict and judgment thereon for \$10,000.

It was charged that defendant was guilty of negligence in improperly constructing the passenger platform at Princeton, in not lighting the same at night and in running its passenger train into the station grounds at a high rate of

speed, without proper warning of its approach, whereby plaintiff, while exercising proper care on his part, was struck by the train and injured.

The evidence at the trial was that there were double tracks north of the depot at Princeton, the one next the station for east-bound trains, and the one farther north for west-bound trains. There was a platform extending from the depot to near the south track and there was another platform, eight feet wide, on the north side of the north track for business connected with west-bound trains and for the use of the passengers who wished to take such trains. The platforms were nearly level with the tops of the rails, being two inches above them, and they were connected with each other by two plank crossings level with the tops of the rails, one crossing at the east end of the depot and the other fifty-two feet west and opposite the ladies' waiting room. Plaintiff was advance agent of an operative company, and in the prosecution of that business was about to take the train from Princeton to Kewanee and this was a west-bound train. It was about two o'clock at night and there was starlight but no moon. There was a little snow on the ground and the night was fairly dark, but objects could be distinguished. There was a light in the depot which shone across the tracks, but no light outside except a lantern which the night operator carried, until the headlight of the approaching engine lighted up the tracks. Before the train came the persons about the place could all see the platform and rails and the locations of persons on the north platform, as well as the trucks of the express man and night operator, and they testified to such locations. The train was due and was expected. The express agent, with the express matter on a truck, had gone across to the north platform and plaintiff followed the night operator, with the baggage truck, across toward that platform. There was evidence that the train had whistled for the station. At any rate all parties expected it at the time. There was some question at the trial whether plaintiff had got across the tracks when he was struck by the engine.

George R. Swengel, a witness called by him, was the express agent who was at his truck on the north platform, and he testified that he saw him coming across the tracks; that when he last saw him he was at about the middle of the north track between the rails and the engine was about half a length from him, some fifteen or twenty feet; that he did not see him any longer on account of the rays of the headlight being cast directly in front, above plaintiff's head, and by their intensity making the space below them, at the pilot, dark, and that the next he saw of plaintiff he fell on the platform thirty-five or forty feet west of where he crossed. Plaintiff's witness, Oscar Arling, who drove the omnibus, testified that he saw plaintiff about seven feet up in the air in front of the engine, which would indicate that he was struck by a part of the engine which would throw him upward. Plaintiff was certain that he had crossed the tracks and taken a position on the platform, and that he had stood there thinking about business matters before he was struck. If we assume that his version is correct, and there is some corroborating evidence, there can be no doubt that he was practically in front of the part of the engine that struck him, for he was either thrown or carried a considerable distance in front of the engine and nearly in line with it. He was not only seen in the air in front of the engine, but he fell with his head and part of his shoulders between the rail and the platform, and Swengel pulled him away from the side of the train. If he was on the platform he was on the edge of it. The edge of the platform was nineteen and one-half inches from the outside of the nearest rail, and the bunting-beam of the engine which struck him extended over the edge of the platform but four and three-fourths inches. The bunting-beam was about the height of his hip where the neck of the thigh bone was broken. The headlight of the engine was burning and lighted up the track for a distance of two or three hundred feet ahead of the engine, except immediately in front and below the light. A short distance east of the depot the tracks curved to the north, and the headlight came in view of the persons on this platform, at least five or

six hundred feet east of the depot. There is but little, if any doubt, from the evidence, that the bell on the engine was ringing on the approach to the station. There was some difference of opinion in the estimates of speed of the train, but it stopped at its usual place without any new application to the brakes, and it stopped before it passed plaintiff, who was lying by the side of the train. There was no evidence of negligence in respect to light or speed as a cause of the injury.

The evidence at the trial and the argument here is mainly directed to the charge that defendant was guilty of negligence in the construction of the platform from which plaintiff was to get on the train. The platform, considered merely as a platform, was safe and free from objection and no one could be injured by it. It was firm and level, free from obstructions or holes and of sufficient width. The only possible danger to one using it consisted in its being near to the track along which a train might come and injure a person, and this is the particular in which it is argued that defendant was negligent. It is insisted that a platform for use in getting upon and alighting from cars, should be so far from the nearest rail that a passenger may stand with safety at any point on the platform, no matter how near its edge, without any risk of being struck or injured by a passing train, and that it is negligence to build a platform so near that a person may not stand on its verge in security while an engine approaches and passes him. A railroad track along which a train may pass is necessarily a place of danger. Platforms along such places are designed to afford a means of passage along and approach to the trains. Every person knows that it is not safe or prudent to stand on the edge of a platform while a train is passing, if the train does not overlap the platform at all, and only comes even with its edge. To be safe for such purposes a platform would have to be some distance away so as to be unservicable as a platform. Such a platform as a person of reasonable prudence would stand on the edge of while a train would pass him, would be of no use in alighting from or getting on cars.

There was some evidence as to how far certain kinds of cars extended over this platform, but that is immaterial in this case and has nothing to do with plaintiff's injury. He was struck by the engine, which extended over the platform four and three-fourth inches, and the fact that some kind of car would extend over further, did not injure him. To build a platform so narrow or in such manner between tracks as to compel a passenger to stand dangerously near a train, has been held to be negligence for which a company is liable in case of injury; but where the platform was eight feet wide, so as to afford plenty of room to stand in safety, we think it was clearly not negligence to build it so that the nearest edge could not be occupied in safety as a standing place while a train was passing. *Matthews v. Pennsylvania Ry. Co.*, 24 At. Rep. 67.

Plaintiff testified that he had an overcoat on and had it turned up around his ears; that he stood with his back toward the direction that the train was to come from, looking southwest; that he could see the rail and the line of the platform; that the keeper of the hotel in Kewanee did not want to keep show people, and that he was thinking about that fact and trying to scheme some way to avoid the difficulty, when something flashed on him, causing him to turn slightly to look and see what was coming, and he was immediately struck and remembered no more. The headlight necessarily illuminated the track, but he testified that he did not see the headlight and had no recollection of hearing the rumble of the train, but that the light from the depot shone across the tracks and showed the platform and the rail near it. It is clear that he was paying but little if any attention to his surroundings and was giving no heed to the approach of the train, which he came there to take. His thoughts were elsewhere, and so far as this train was concerned, he was making no use of any of his senses, nor paying any attention to the business that brought him to the station. It is insisted in his behalf that in so doing he was not guilty of negligence; and the argument proceeds upon the theory that a railroad platform is made by the company for passengers to stand on while waiting for trains, and that

being invited to stand there he had a right to presume that he could stand next the track and be safe; that he was thereby lulled into a feeling of false security, and that the defendant thereby became responsible for his inattention to probable danger. It is argued that there was no requirement of precaution on his part to keep a lookout for the train, but that he had a right to be engaged in thought about other business, relying for safety upon the supposed duty of the defendant to build its platform so that he would not be hurt by a train passing it, provided only that he was on the platform. We are unable to agree to these propositions. There were waiting rooms provided in the depot, where no train could disturb him and where he could become absorbed in thought or study out his problems. When he went on the platform his business there was to take the train, and he should give reasonable attention to that business. Ordinary prudence required that he should pay some attention to know how near he was to the train. He testified that he thought he was about the middle of the platform, but he could see the south edge, and any attention at all would have shown him that he was not in the middle. There was nothing to excuse his want of attention. There might be cases where a person might be engaged in some act with baggage or with some other person, or something might occur that would affect the question of care on his part; but plaintiff had no excuse and no other business there except to take that train. Upon the evidence, the accident can only be accounted for upon the belief that he became so abstracted in thought that he was oblivious of his surroundings. It seems clear to us that he was guilty of negligence, which was the proximate cause of his injury.

We find no reversible error in rulings on the evidence or in the instructions.

For the reason that the evidence failed to prove negligence on the part of appellant, causing the injury, or ordinary care on the part of appellee, the judgment will be reversed and the cause remanded.

Reversed and remanded.

47 214
53 206

CITY OF SAVANNA

V.

WILLIAM LOOP.

Municipal Corporations—Street Improvements—Injury to Private Property—Evidence—Damages.

1. In an action by the owner of a lot against a city to recover damages for injury from an improvement of an adjoining street, the jury are to determine whether the improvement taken as a whole damaged the property. If the benefits exceed or equal the damage, the plaintiff can not recover.

2. The question is as to whether the property has been depreciated in value by the construction of the improvement, and this can be determined from an estimate of the value of the property immediately before and after the construction of the improvement.

3. It is proper in such case to admit in evidence a plat showing the land described in the declaration to be divided into town lots.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Carroll County; the Hon. JAMES SHAW, Judge, presiding.

Messrs. ALVA F. WINGERT and GEORGE L. HOFFMAN, for appellant.

Messrs. J. M. HUNTER and R. E. EATON, for appellee.

MR. JUSTICE HARKER. Appellee is the owner of a tract of land fronting for a distance of five hundred feet on a public street in the city of Savanna, known as Chicago avenue. A portion of it is occupied by himself and family as a residence. The remainder has been divided into town lots to be sold. The street bounds the property on the north. On the north side of the street is an abrupt bluff, into the side of which some years ago excavations were made, and the dirt and stone carried south several feet for the purpose of constructing a country road.

City of Savanna v. Loop.

The road has been used by the public for a long time, but was usually in bad condition. After the city assumed control and made it the street named, further excavations were made, the road bed macadamized, and a stone or rip-rap wall, varying in height from three to six feet, was constructed along the south line of the street near appellee's fence. The effect of this improvement was to destroy appellee's mode of egress and ingress between the street and the property. He claims also to have sustained damage by reason of the breaking and crumbling of rock from the wall over and upon his premises. He accordingly brought suit and recovered judgment against the city for \$400.

The chief grounds on which a reversal is asked is that the great preponderance of the evidence shows that appellee was not on the whole damaged but benefited by the street improvement.

As is usually the case in a controversy of this character there was great diversity of opinion among the witnesses as to the effect of the street improvement upon the value of the property. A majority were of the opinion that the property was not damaged but substantially benefited.

But the jury were further enlightened in the case by a personal view of the premises. The inspection, which they made under the direction of the court, enabled them to weigh much more satisfactorily the conflicting testimony than a court reviewing the record merely. We are not prepared to say that the jury reached an incorrect conclusion in deciding against the opinion of a majority of the witnesses. It was not error to admit in evidence the plat showing the land described in the declaration to be divided into town lots.

The rulings of the court in passing upon questions of evidence and in sending the jury to view the premises were consistent with the holdings of our Supreme Court in *Springer v. City of Chicago*, 135 Ill. 552.

In an action by the owner of a lot against a city to recover damages for injury from an improvement of an adjoining street, the jury are to determine whether the "im-

provement, taken as a whole, damaged the property." If the benefits exceed or equal the damage the plaintiff can not recover. The question is whether the property has been depreciated in value by the construction of the improvement, and this can be determined with certainty from an estimate of the value of the property immediately before and after the construction of the improvement.

The case was presented to the jury by both sides upon that theory of the law. While the third and fourth instructions given for appellee are perhaps open to the criticism that they omit to direct the jury to take into consideration the effect of the entire improvement upon the value of the premises, that feature was made so prominent upon the trial and in other instructions given, that we can not see how the appellant was prejudiced thereby.

We see no good reason for reversing the judgment.

Judgment affirmed.

JOHN W. BIRKENHEAD

V.

DELOS S. BROWN.

Chattel Mortgages—Priority—Injunctions.

This court affirms a judgment for the complainant in a controversy involving the question of priority of chattel mortgages.

[Opinion filed May 25, 1893.]

IN ERROR to the Circuit Court of Peoria County; the Hon. T. M. SHAW, Judge, presiding.

Mr. ARTHUR KEITHLEY, for plaintiff in error.

Messrs. PUTERBAUGH, PAGE & PUTERBAUGH, for defendant in error.

Birkenhead v. Brown.

MR. JUSTICE CARTWRIGHT. John W. Birkenhead, plaintiff in error, owned and operated a transfer business in Peoria, and negotiated a sale of the property employed therein and the business to his employe, Joseph C. Kennedy. The purchase price was about \$2,300, and Kennedy had no means. It was agreed between them that if Kennedy could borrow \$1,000 for a first payment, Birkenhead would take a mortgage on the property for the balance. Birkenhead was then indebted to Delos S. Brown, defendant in error, in the sum of about \$200, and it was agreed that if Brown would furnish money for such first payment, the \$200 should be applied as part of such payment, and Birkenhead should buy a piano, costing \$450, from a firm of which Brown was a member, and Brown was to have a mortgage on the transfer property for the total sum. Brown accordingly advanced \$800 cash, and this, with Birkenhead's debt of \$200 and the piano at \$450, amounted to \$1,450. A mortgage was made by Kennedy to Brown for \$1,350, and another mortgage to Birkenhead for \$927, both on the transfer property. It being found that the mortgage to Brown was not large enough, another was made to his firm for \$100, and that amount was indorsed as a credit on the mortgage for \$927 to Birkenhead. The mortgages were all made and recorded on the first day of May, 1891, and the mortgage to Birkenhead was recorded first. In June, 1891, Birkenhead pledged the note and mortgage made to him to the First National Bank of Peoria as collateral. Afterward, Birkenhead being about to foreclose his mortgage, Brown filed the bill in this case to enjoin the foreclosure, and to have his security declared a prior lien to that of Birkenhead, alleging an agreement between himself and Birkenhead to that effect, and making Kennedy, Birkenhead and the bank defendants.

Issues were formed and the cause referred to the master, who found that there was no agreement that Brown's mortgage should have priority and found in favor of the bank to the extent of its claim, and that the equities were with the defendants to the bill. Brown excepted to the findings of the master except as to the bank's claim, and on a hear-

ing of the exceptions they were sustained, the findings as to priority were set aside, and the court found that there was an agreement by which Brown's mortgage was to have priority and decreed accordingly. Whether there was such an agreement is the only question of fact in the case.

The parties contradicted each other in their testimony as to the actual making of the agreement, although Birkenhead testified that Brown spoke of having a first mortgage, and that he supposed and believed that Brown intended to have a first mortgage. He testified that he did not say that Brown should have it. The mortgages were all made out at the same time and Birkenhead did not claim any agreement that his mortgage was to be a first lien; but the inference from his testimony is that the question of priority was left to be settled by a race to the recorder's office. Kennedy corroborated Brown as to the agreement, but he had made an affidavit in the case which was contradictory of his testimony and which affected his credibility. Brown was corroborated also by the facts and circumstances, and his testimony is more probable than that of Birkenhead. That he required and intended to have and supposed that he was getting a first mortgage, can not be reasonably doubted, and it is not probable that the matter was left without an agreement to depend upon getting to the recorder's office first. A study of the evidence leads us to the conviction that the court was right as to the fact.

A question is raised whether the agreement could be proved by oral testimony, because it is said that there was written evidence of the contract of the parties. There was no written agreement between Brown and Birkenhead, and consequently no writing in which their oral agreements were merged. The decree will be affirmed.

Decree affirmed.

Waggeman v. Richardson.

JOHN WAGGEMAN
V.
EDWARD E. RICHARDSON ET AL.

Contracts—Architect's Sketches—Recovery for Making of.

Where an architect is employed to make sketches for a building proposed to be erected, the understanding being that in case the same are satisfactory, working plans and specifications are to be made in accordance therewith, his client is bound to give him a chance to make them satisfactory by making known his objections. Where, after the submission of sketches, the client declines to go on with the work, he is bound to pay a reasonable sum for the services rendered.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Peoria County; the Hon. N. E. WORTHINGTON, Judge, presiding.

Mr. J. A. CAMERON, for appellant.

Mr. ARTHUR KEITHLEY, for appellees.

MR. JUSTICE CARTWRIGHT. This suit was brought by appellees before a justice of the peace, to recover from appellant for services rendered in making sketches for a block of buildings, and there was a recovery before the justice. On appeal to the Circuit Court there was a verdict for appellee for \$75, from which the court required \$25 to be remitted and judgment was entered for \$50.

It was proven that appellant contemplated the erection of a block with store rooms below and flats above, and employed appellees to make sketches for the same. During the time the sketches were being made he was frequently in their office examining them, and counseling, advising and making suggestions concerning them. There was no bargain as to the price to be paid for the sketches, but if they were made satisfactory to him, working plans and specifi-

cations were to be made in accordance with them for use in the erection of the buildings. He made no objection to the sketches to appellees, and made none on the trial, except that the buildings would cost more than a limit which he claimed had been set by him. Both the fact of the limit and of the cost exceeding the sum stated was denied, but at any rate he never asked to have the plans cheapened so that there could be an opportunity to make them satisfactory in that respect. They were to be made satisfactory to him, so as to represent his ideas and wishes, and he was bound to give appellees a chance to make them so by making known his objections. He did not proceed to build according to the sketches, so that working plans and specifications were never made. The evidence showed no cause of complaint on his part, but showed that his action was from mere caprice and without any reasonable cause. Under these circumstances he was liable for what the work was reasonably worth. Appellees called on him for payment and charged him \$50, which they stated to be one-half the usual charge for such work, and they offered to give him credit on final settlement for the amount, if paid, in case he should have the working drawings made. He refused to pay anything.

The amount of the judgment was less than the work was reasonably worth, and less than the customary charge for such work, as shown by the evidence. It is objected that there was no evidence on which to base the third instruction for appellees. This is a misapprehension of the evidence. We are satisfied with the judgment, and it will be affirmed.

Judgment affirmed.

CHARLES W. PHENIX

V.

MARY C. GILFILLAN ET AL.

Replevin—Gift.

1. A verbal gift unaccompanied by a delivery of possession is not sufficient to change the title thereto.

Phenix v. Gilfillan.

2. In an action of replevin brought to recover a piano, the defendant alleging it to be a gift, and the plaintiff contending that there had been no delivery thereof, this court holds that the direction given by the latter to the former to take the same from his house, followed by a removal, amounted to a sufficient delivery.

[Opinion filed May 25, 1893.]

APPEAL from the Circuit Court of Stark County; the the Hon. N. E. WORTHINGTON, Judge, presiding.

Mr. B. F. THOMPSON, for appellant.

“To constitute a gift *inter vivos*, there must be a gift absolute and irrevocable, without any reference to its taking effect at some period. The donor must deliver the property and part with all present and future dominion over it.” *

* * “The delivery must be such as to vest the donee with the control and dominion over the property, and to absolutely divest the donor of his dominion and control, and the delivery must be made with the intent to vest the title of the property in the donee. *Roberts v. Draper*, 18 Ill. App. 167 [170], and authorities cited; 3 Wait’s Act. & Defenses, p. 487, and authorities cited.

A delivery of the subject-matter of the gift, so far as it is capable of a delivery, is of the essence of the title. *Wilson v. Keller*, 9 Ill. App. 347.

A parol gift of a chattel is incomplete without a delivery or something equivalent to a delivery. Without such delivery no title passes. The donor must part with the possession and dominion of the property. *The People v. Johnson*, 14 Ill. 342.

And a verbal gift without delivery may be resumed by the giver. *Cranz v. Kroger*, 22 Ill. 74 [80].

A mere gift of property, unless there is some act of delivery, will not pass the title to the donee so as to enable him to recover for it in any action. *Moore’s Justice (Civil)* Sec. 495, and authorities cited.

Messrs. V. G. FULLER and M. A. FULLER, for appellees.

MR. JUSTICE HARKER. This was an action of replevin commenced by appellant to recover the possession of a piano.

The defense interposed was that appellant, about two years before the commencement of the suit, gave the piano to appellee, Mary C. Gilfillan.

It appears from the evidence that the piano was purchased by appellant and placed in his house in 1884. His family at that time consisted of himself, his wife and Mary Nowlan, now Mary Gilfillan. Mary had been in the family since she was eight years old. She testified that appellant had frequently promised to give her the piano and that after she married and moved from appellant's home with her husband he did give it to her and told her to take it from his home, then rented to and occupied by a tenant, which she did. Appellant denied giving the piano to Mrs. Gilfillan and denied that he authorized her to take it from his home.

The jury found the title to the piano to be in Mrs. Gilfillan. Mrs. Gilfillan was corroborated by her husband and a witness named Irvin Lattin, who testified to conversations had with appellant after the removal of the piano from his house to the effect that he had given the piano to her.

Appellant contends that whatever view may be taken of the controverted statement that he gave the piano to Mrs. Gilfillan the gift was not valid because there was no delivery of the property to her.

While it is true that a verbal gift, unaccompanied by a delivery of possession, is not sufficient to change the title to personal property, we are of the opinion that the direction given by appellant to Mrs. Gilfillan to take the piano from his house, followed by a taking of it, amounted to a sufficient delivery.

We see no error in the trial court in giving, refusing or modifying instructions.

We approve the finding of the jury and the judgment of the court below.

Judgment affirmed.

Dick v. The People.

ROBERT F. DICK
V.
THE PEOPLE OF THE STATE OF ILLINOIS.

Dram Shops—Sale to Minor—Evidence.

1. In the prosecution of a saloon keeper for the alleged sale of intoxicating liquor to a minor, the father of the latter should not upon trial be allowed to testify that he had told the father of the saloon keeper certain things touching such alleged sales.

2. Where in such case the minor testifies to having purchased liquor of such saloon keeper, and being asked upon cross-examination if he had not told a third person that he could not obtain liquor from such person, and answers, that he never did, it is proper to allow such person to testify by way of impeachment that he so told him.

[Opinion filed May 25, 1893.]

IN ERROR to the Circuit Court of Ogle County; the Hon. JAMES SHAW, Judge, presiding.

Messrs. O'BRIEN & O'BRIEN and J. C. SEYSTER, for plaintiff in error.

Mr. D. W. BAXTER, State's Attorney, for defendants in error.

MR. JUSTICE HARKER. The plaintiff in error was convicted of selling intoxicating liquor to a minor, and sentenced to pay a fine of thirty dollars and to confinement in the county jail for thirty days.

Upon the trial the court (against the objection of plaintiff in error) permitted the father of the minor to testify that he told the father of the plaintiff in error that "Robert Dick had been selling whisky to his boy again; that he had forbidden him, often enough, and that he should follow him to the extent of the law for doing so; that the boy had come home drunk, and that he had fair knowledge that he

got the whisky at the saloon of plaintiff in error." This was error.

The minor testified that on the 18th of June, 1892, he obtained liquor at the saloon of plaintiff in error frequently and became quite intoxicated there. On cross-examination he was asked whether he did not say to one George Brown that he was unable to get anything to drink at the saloon of plaintiff in error, to which he replied, "no." The court refused to allow George Brown to testify by way of impeachment that the minor had so told him.

The declaration of such minor, if made, tended to impeach him, and inasmuch as the proper foundation was laid for the introduction of Brown's testimony upon that point, the court erred in refusing to allow it to go to the jury.

Inasmuch as the sales to the minor were denied, and there was a conflict in the testimony, the two errors indicated may have worked great injury to the plaintiff in error.

And because of them, the judgment must be reversed.

Reversed and remanded.

SILAS R. AUSTIN ET AL.

V.

FIRST NATIONAL BANK OF MORRISON.

Fraudulent Conveyance—Creditor's Bill—Insolvency.

1. One indebted and insolvent has no right to make a voluntary conveyance to a third party, without consideration, as against the claim of existing creditors. If such a conveyance is made as to such creditors, the law conclusively presumes it to have been done with fraudulent intent, no matter how free from such fraudulent intent the parties may in fact have been.

2. If a conveyance of real estate or other property be made with actual fraudulent intent on the part of the grantor, and the grantee have knowledge of such intent, and participate in it, such conveyance will be deemed fraudulent as to existing creditors.

Austin v. First Nat. Bk.

3. The condition of a debtor making a voluntary conveyance, as to solvency, is what the law regards, and not his belief.

4. In the case presented this court holds, in view of the evidence, that the conveyance by a party named to his son of certain real estate was fraudulent in a legal point of view, and that the decree subjecting the same to sale under certain executions was in the main correct.

5. It is not necessary that execution should have issued on given judgments and been returned *nulla bona*, the same being liens on the equitable interest of the grantor, the object of the bill being to remove a conveyance as fraudulent. In such case equity has jurisdiction.

6. The court modifies the decree in the case presented in so far as to allow the application by complainant bank of funds in its hands to the extent of one-half thereof on a certain judgment, the other half to be recovered from the defendant found herein to have conveyed his property in fraud of certain creditors.

[Opinion filed May 25, 1893.]

IN ERROR to the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding.

On the 30th day of March, 1891, William S. Austin and Silas R. Austin were indebted to the First National Bank of Morrison.

That indebtedness was evidenced by what are commonly called judgment notes. There are two of these notes. One was for \$1,000, and the other was for \$1,500; this last one was signed by A. E. Austin also.

The bank corporation also held a note that was a judgment note, that had been executed by William S. Austin, Silas R. Austin and Dennis Austin, to one Samuel Curry for \$1,200; that note had been assigned by Mr. Curry to the bank. Silas R. Austin was only security on all the notes for William S. Austin, his brother. On that same 30th day of March, 1891, Silas R. Austin, one of the plaintiff's in error, was the owner in fee of the lands and premises involved in this controversy.

Those lands and premises on that day were incumbered by mortgages executed by himself and wife aggregating about \$4,500.

The lands in controversy were worth on the day above

referred to at least \$9,000; on that same day Silas R. Austin, his wife joining him in the conveyance, executed a warranty deed to Marion L. Austin, the son of the grantors, conveying to him the lands and premises involved in this controversy for a pretended consideration mentioned in the deed of \$100, subject to the incumbrances then on the land.

Silas R. Austin and his wife were living at that time in the village of Lyndon, in Whiteside County, in a property, a house and lot, that he then owned and at the same time he executed a conveyance to Lettie L. Miller, conveying that homestead property to her, she being the married daughter of the grantors, living separate and apart from them. The conveyances of the different properties by Silas R. Austin, as above stated, left him in an absolutely insolvent condition. The homestead lot, it is conceded, can not be reached in this proceeding.

Marion L. Austin is a young man living separate and apart from his parents; is a married man engaged in farming, and of limited means. William S. Austin, one of the co-makers of the several notes above referred to, was a stock dealer residing at Morrison, in Whiteside County, a brother of Silas R. Austin; he failed in business suddenly, and on the 30th day of March, 1891, made an assignment to John F. Hecker under the State law. William S. Austin's bankrupt estate had not assets sufficient to liquidate his indebtedness, and in fact but a small portion of it, not to exceed sixty cents on the dollar.

Marion L. Austin, when he took the deed from his father and mother for the lands in controversy, on the 30th day of March, 1891, did not pay the pretended \$100 mentioned in the deed as the consideration for the same; if he ever did, it was after the bill was filed attacking the deed for fraud.

The deed from Silas R. Austin and his wife to Marion L. Austin was filed for record with the recorder of deeds of Whiteside county on the 30th day of March, 1891, at 4:25 o'clock p. m., and recorded in book 138 of records, on page 202. On the 31st day of March, 1891, a judgment was

entered by confession in favor of the First National Bank of Morrison, the complainant in the original bill filed herein, on one of the notes above referred to, executed by William S. Austin and Silas R. Austin; that judgment was for \$999.11 and costs of suit; and on the same day execution was issued on that judgment and levied on the property in controversy as the property of Silas R. Austin.

There was also rendered in said Circuit Court on said 31st day of March, 1891, a judgment in favor of the bank v. William S. Austin, Augustus E. Austin and Silas R. Austin, for \$1,506.07 and costs of suit on another one of the notes above referred to; upon which execution issued at that time, was placed in the hands of the sheriff of the county and levied upon the lands in controversy.

On the 1st day of April, 1891, there was a judgment rendered in favor of the bank and against William S. Austin, Silas R. Austin and Dennis Austin, in the Circuit Court, upon the note bank received from Curry, against the defendants for \$1,294.13 and costs, which was by confession; upon which execution was duly issued on that day, placed in the hands of the sheriff and levied upon the lands in controversy in this case, as the property of Silas R. Austin.

A bill was then filed in the Circuit Court, on the chancery side thereof, which is in the nature of a creditor's bill, attacking the deed executed by Silas R. Austin and wife to Marion L. Austin, on the ground of fraud and asking the court that by its decree the cloud created by that deed might be removed out of the way of the several executions aforesaid, and that the premises might be sold under the executions untrammelled by that deed.

Fraud was also charged in the bill in the conveyance by Silas R. Austin and his wife to Lettie L. Miller of the homestead property in Lyndon, but not sustained. Answers were filed denying the allegations of fraud; claimed the deed was executed for valuable consideration, and that as to one of the judgments, inasmuch as the bank corporation after this bill was filed, as was alleged, released certain lands of one Dennis Austin from the lien of such judgment, it

therefore paid the same. A release of lands was made, and certain moneys were deposited with the bank as collateral on the part of Dennis Austin to the judgment set up in the bill against him and Silas R. and William S. Austin; and it is claimed that such deposit was a payment. The evidence shows that enough of the money arising from a loan procured by Dennis Austin on the security of his lands released to satisfy the judgment in full on which Dennis and Silas R. Austin were joint and several securities for William S. Austin, their brother, but appellee claims only placed there as security for the satisfaction of the judgment.

Upon replication being filed the cause was referred to H. C. Ward, special master, who, upon a hearing of all the evidence, reported the same and his findings to the Circuit Court, sustaining the allegations of the bill as to fraud, and finding the defendant in error entitled to the relief prayed for except as to the judgment rendered upon the note given to Curry, and endorsed to the defendant in error, signed by William S. Austin, Silas R. Austin and Dennis Austin, jointly, and as to that he found by the joint act of defendant in error and Dennis Austin, it was released, and that the decree should so find. All the exceptions of appellant as to the findings of the special master in his favor were overruled, and the defendant in error's exception to his finding as to the judgment last above named was sustained.

The court, upon final hearing, granted the relief prayed for in the bill and signed a decree accordingly, from which decree this writ of error is prosecuted and reversal sought.

Mr. F. E. ANDREWS for plaintiff in error.

If a case of actual fraud be alleged, relief can not be had by proving a case of constructive fraud. *Perry v. Jewell*, 1 K. and J. 671; *Eyer v. Potter*, 15 How. 42; *Gerde v. Hawkins*, 2 Der. Eq. (N. Car.), 393; *Paper v. Hoard*, 107 N. Y. 67; *Kennedy v. Bruner*, 29 Ill. App. 443.

The answer of the defendants asserts with the utmost positiveness the good faith of the several transactions. That the conveyances were *bona fide* sales for valuable con-

siderations and with no intention to hinder and delay creditors, etc., * * * the burden of proving the conveyances fraudulent and done with intent to hinder and delay creditors rests upon the complainant. *Sawyer v. Moyer*, 109 Ill. 465. Fraud can not be assumed; it must be proved. *Hatch v. Jordon*, 74 Ill. 417; *Phelps v. Curts*, 80 Ill. 112; *Lawson v. Funk*, 108 Ill. 502.

Fraud can not be established by circumstances that merely raise a suspicion. *Byrant v. Simoneau et al.*, 51 Ill. 327; *Reed v. Noxon*, 48 Ill. 325; *Bullock v. Narrot*, 49 Ill. 65.

The fact that the sale was made to a near relative, that is, between father and son, is not a badge of fraud. *Nelson v. Smith*, 28 Ill. 501; *Eads v. Thompson*, 109 Ill. 91 and 92; *Tyberandt v. Raucke*, 96 Ill. 71; *Wait on Fraudulent Conveyances*, Sec. 242.

Indeed, in the absence of fraud, the court will not say that a man may not sell to a near relation on better terms than he would have to give to a stranger. *May on Fraudulent Conveyances*, second edition, by Worthington, p. 57.

An honest instrument executed, for which the consideration is partly meritorious and partly valuable, and the instrument is one between relations, the court can not say that the difference between the real value and the consideration is a badge of fraud, and if not a badge of fraud or evidence of an intention to defraud creditors, it has no relation to the case. *May on Fraudulent Con.*, 2d Ed., p. 57; *In re J. Johnson*, 20 Ch. D., Per Try. J. 391-7; *Nelson v. Smith*, 28 Ill. 501; *Roe v. Milton*, 2 Wils. 358; *Wait on Fraudulent Conveyances*, Section 208; *May on Fraudulent Conveyances*, p. 251-2; *Eads v. Thompson*, 109 Ill. 145.

"It was said by the court in *Boltom v. Midden*, L. R. Q. R. 57, that the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced." *May on Fraudulent Conveyances*, p. 25-33.

"In the absence of evidence to the contrary, honesty and

fair dealing is always presumed, and if any person claims that there is a fraud in any transaction it devolves upon him to prove the fraud." Long v. West., 31 Kas. 298; Sawyer v. Myers, 109 Ill. 461; Hoosur v. Hunt, 65 Wis. 71.

"The fraud can not be assumed, it must be proved." Hatch v. Jordon, 74 Ill. 417; Phelps v. Curts, 80 Ill. 112; Lawson v. Funk, 108 Ill. 502

It is not enough to prove fraud against the grantee. Both parties must be proved to have participated in the fraud. Hatch v. Jordon, 74 Ill. 417; Ewing v. Runkle, 20 Ill. 448-85; Myers v. Kinzie, 26 Ill. 36-38.

The demurrer should have been sustained to the bill (1st) for the reason that the executions nor no one or more of them was returned unsatisfied in whole or in part. Durand & Co. v. Gray et al., 129 Ill. 9; Moshier v. Meak, 80 Ill. 79; Dormueil v. Ward, 108 Ill. 219.

See further authorities cited under Sec. 49, Chap. 22, R. S., Star & Curtis.

The extension of the time of payment of a note releases the security. Rogers v. Trustees of Schools, 46 Ill. 431; 31 Ill. 269; 24 Ill. 610.

The payment of interest in advance is a good consideration for extending the payment of a note. Maher v. Lanfrom, 86 Ill. 518; 31 Ill. 269, 258; 27 Ill. 323.

The bank knew that Silas R. Austin was security. See testimony of William S. Austin, as to extension of time. Such defense may be set up by grantee. Maher v. Lanfrom et al., 86 Ill. 518, and cases cited on page 521; Pike v. Crist, 62 Ill. 461; Safford v. Vail, 22 Ill. 327.

Mr. O. F. WOODRUFF, for defendant in error.

A party may file his bill to remove a fraudulent conveyance without showing that he could not obtain satisfaction out of other property of the defendant, and without having execution returned *nulla bona*. Dunham v. Cox, 10 N. J. Equity, 437; Miller v. Davidson, 3 Gilm. 518-522; Weightman v. Hatch, 17 Ill. 287; Newman v. Willetts, 52 Ill. 98-102.

Where the grantee, in a deed made to defraud the creditors of the grantor, knows of the fraudulent intent of the grantor, or has knowledge of facts sufficient to excite the suspicion of a prudent man and put him upon inquiry, he makes himself a party to the fraud. Actual knowledge by the vendee is not essential. *Bartles v. Gibson*, 17 Fed. Rep. 293-297; *Atwood v. Impson*, 20 N. J. Equity, 156; *Baker v. Bliss*, 30 N. Y. 70; *Avery v. Johnson*, 27 Wis. 251; *Hopkins v. Langdon*, 30 Wis. 381; *U. S. v. Houghton*, 14 Fed. Rep. 545; *Gollober v. Martin*, 6 Pacific Rep. 267; *Bump on Fraudulent Conveyances*, 206.

The law presumes that every man intends the necessary consequences of his acts, and where the conduct of the debtor necessarily results in defrauding his creditors, he is presumed to have foreseen and intended such results. *Gollober v. Martin*, 6 Pac. Rep. 267-269; *Nichols v. Nichols*, 18 At. Rep. 153-154.

If a part of the consideration for a transfer is merely a nominal or colorable consideration contrived to hinder, delay or defraud creditors, the whole transfer is void. *Bump on Fraudulent Conveyances*, 476; *Marriott v. Givens*, 8 Ala. 694; *Tatum v. Hunter*, 14 Ala. 557; *McKenty v. Gladwin*, 10 Cal. 227; *Scales v. Scott*, 13 Cal. 76; *Mead v. Combs*, 19 N. J. Equity, 112; *Wedgworth et ux. v. Wedgworth*, 4 So. Rep. 149; *Wedgworth v. Withers*, 53 N. W. Rep. 576.

If a purchaser knows, when he takes a deed, that the object of the grantor is to defraud creditors, the deed is void, though he may give a full consideration therefor. *The Farmers' Bank v. Douglas*, 11 S. & M. 545; *Edgell v. Lowell*, 4 Vermont, 505; *Green v. Tantum*, 19 N. J. Equity, 105-110; *Schmidt v. Opie*, 33 N. J. Equity, 138-141; *Holt v. Creamer*, 34 N. J. Equity, 181-189; *Davis v. Birchard*, 53 Wis. 492.

The conveyance of property, as against an existing creditor of the grantor, can not be supported unless shown to have been founded on an adequate as well as valuable consideration; and when a controversy arises between the

grantee and an existing creditor as to the validity of the conveyance, the onus of proof that it was founded on an adequate and valuable consideration is cast on the grantee; and the recital of a consideration in the conveyance is *not* evidence against the creditor. *Fisher v. Moog*, 39 Fed. Rep. 665; *Hubbard v. Allen*, 59 Ala. 283; *Bump on Fraudulent Conveyances* (2d edition) 269; *Wedgworth v. Wedgworth*, 4 So. Rep. 149; *Bump on Fraudulent Conveyances*, 43; *Sands v. Hildreth*, 2 Johnson's Chancery, 35; *Gardner Bank v. Wheaton*, 8 Me. 373; *Bowles v. Shoenberger*, 2 B. & Mon. 373; *Doughton v. Gray*, 10 N. J. Equity, 323; *Haney v. Nugent*, 13 Wis. 283; *Steere v. Hoagland*, 39 Ill. 264; *Monell v. Sherrick*, 54 Ill. 269; *Merry v. Bostwick*, 13 Ill. 398; *Bay v. Cook*, 31 Ill. 336; *Gordon v. Reynolds*, 114 Ill. 118.

It is not necessary that insolvency should always be proved or presumed in order to render a conveyance void. If the indebtedness is so large that the effect of the transfer is to defraud creditors, the conveyance is void. *Parkman v. Welch*, 36 Mass. 231; *Swartz v. Hazelett*, 8 Cal. 118; *Potter v. McDowell*, 31 Mo. 62; *Blake v. Sawin*, 92 Mass. 340.

A conveyance is voluntary when the consideration is merely nominal and it prevents the grantor from acting fairly toward his creditors and disables him from paying his debts, and results in hindering or delaying his creditors; notwithstanding he may make the conveyance with the most upright intentions. *Guffin v. The First National Bank of Morrison*, 74 Ill. 259; *Harmon v. Harwood*, 26 App. 341; *Bump on Fraudulent Conveyances* (2d edition) 266, 267-288; *Priest v. Conklin*, 38 Ill. App. 180.

The intention with which the conveyance is said to be made is oftentimes of question of law. Every man is held to know the law and the facts regarding his own affairs.

The law also presumes that every man intends the necessary consequence of his act, and if the act necessarily delays, hinders or defrauds his creditors, then the law presumes that it is done with a fraudulent intent. *Fiedler v.*

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Darrin, 50 N. Y. 437; Bump on Fraudulent Conveyances, 266, 267; Swartz v. Hazlett, 8 Cal. 118; Potter v. McDowell, 31 Mo. 62; Robinson v. Stewart, 10 N. Y. 190; Carpenter v. Roe, 10 N. Y. 227; Reade v. Livingston, 3 Johnson's Chancery Rep. 481; Cowling v. Estes, 15 Ill. App. 255-261.

If a grantor is unable, after such conveyance, to meet his debts in the ordinary course prescribed by law for their collection, or is reduced to that situation where an execution against him would be unavailing, the conveyance is void. Bump on Fraudulent Conveyances, 281, 282, 283; Potter v. McDowell, 31 Mo. 62; Mohawk Bank v. Atwater, 2 Paige, 54; Van Wyck v. Seward, 6 Paige, 62; Church v. Chapin, 35 Vermont, 222.

Marion L. Austin having taken the deed from his father with no consideration, or, if any, with such inadequate consideration that the law would term him as a volunteer. Tunison v. Chamblin et al., 88 Ill. 378-385; Gordon v. Reynolds, 114 Ill. 118.

The omission of the grantee or grantor, or any other important witness, to testify as to the facts and circumstances concerning the execution of the conveyances attacked on the ground of fraud, is looked upon by the courts with suspicion; and unexplained, is always a ground for unfavorable presumption. Bump on Fraudulent Conveyances, 52, 53, 54; Glenn v. Glenn, 17 Iowa, 498; Henderson v. Henderson, 55 Mo. 534; Peebles v. Horton, 64 N. C. 374; Hunt v. Blodgett, 17 Ill. 583; Smith v. Tosini, 48 N. W. Rep. 299-301; Probert v. McDonald, 51 N. W. Rep. 212-214; Bartles v. Gibson, 17 Fed. Rep. 293-297.

A creditor can not lawfully pay himself with the debtor's money, without the debtor's consent, and that what parties do can not be judged a payment or extinguishment if it was not so intended at the time. Detroit, Hillsdale & S. & W. R. R. Co. v. Smith, 50 Mich. 112; Moore v. Tate, 22 Gratt. (Va.), 351; Flower v. Elwood, 66 Ill. 438; Kipp et al. v. McChesney, 66 Ill. 460.

MR. JUSTICE LACEY. The question presented in this rec-

ord is, perhaps, more a question of fact than of law. The law is well settled that, one being indebted and insolvent, has no right to make a voluntary conveyance to a third party without consideration as against the claim of existing creditors. If such a conveyance is made as to such creditors, the law conclusively presumes it to have been done with fraudulent intent, no difference how free from such fraudulent intent the parties may in fact have been. We do not understand this principle to be controverted by counsel for appellant. Then, again, if a conveyance of real estate or other property be made with actual fraudulent intent on the part of the grantor, and the grantee have knowledge of such intent and participate in it, such conveyance will be deemed fraudulent as to existing creditors. There are two contentions in this case on the part of defendant in error by which the conveyance of Silas R. Austin to his son, Marion L. Austin, is sought to be vacated and set aside. The one is that the conveyance was made without any consideration, was voluntary and a mere gift, and for that reason, in the insolvent condition of the grantor, void in law as against the complaining judgment creditors of Silas R. Austin, whose debts existed at the time of the conveyance. The other is that, although there may have been a small consideration, though entirely inadequate, the conveyance was made with the actual intention, participated in by both father and son, to defraud, by means of the conveyance, the creditors of Silas R. Austin, and, therefore, as to such creditors void, notwithstanding there was a valuable consideration. This would be controlled by Sec. 4, Chap. 59, R. S., entitled "Frauds and Perjuries," which renders all such conveyances void against the creditors, purchasers or others so intended to be disturbed, delayed, hindered or defrauded.

In the latter case the insolvency of the grantor is probably not a necessary element, although it might weigh heavily as a matter of evidence in establishing the actual fraudulent intent. The appellant insists that Silas R. Austin was not at the time of the conveyance insolvent or in failing circumstances, and that he had remaining, after conveying

his real estate to his son, sufficient property, subject to execution, to pay all his debts. We do not think the evidence sufficiently sustains this contention. Aside from a note of \$3,600, given to him by William S. Austin, he had no property whatever except, perhaps, a \$500 unsecured note on William S. Austin. The \$3,600 note was secured by a mortgage on 640 acres of land in Kansas, already mortgaged for \$4,500. The only consideration of the \$3,600 note was to secure the \$500 note held by Silas or William S. Austin, and to indemnify Silas against his securityship on the notes upon which the three judgments in question in this suit was rendered, and another \$500 note on which he was security to another party. After conveying away his revisionary interest in the 220 acres of land in question, he had nothing but the above mentioned \$3,600 note on his brother, William S. Austin. It will be seen that the note, situated as it was, was very precarious security. William S. Austin was, in fact, insolvent, and made an assignment the same day of this conveyance, and was contemplating it before the conveyance, although he swears he had made it known to no one. His estate, as testified to by Hecker, his assignee, will not pay sixty cents on the dollar. The Kansas land was largely encumbered and nothing could be made out of it without advancing \$4,500 to pay the prior mortgage, and then it was doubtful what the land would be worth.

We feel well satisfied from the evidence that Silas R. Austin was not in a condition financially, in justice to his creditors, to give away so considerable a part of his estate as he did by the conveyance to his son, no matter what his opinion might have been as to his financial ability. He made this conveyance, believing, as he swears, that William S. Austin was solvent and would pay all his debts on which he, Silas R., was security. But the fact was, and it developed on the same day of the conveyance, that William S. was insolvent to the extent mentioned above, which placed Silas R. in the same or a worse condition. It mattered not what, in law, Silas R. thought about his condition of solvency at the time of his conveyance, if in fact, he was insolv-

ent. The law would forbid his conveying away, without consideration, his property thus, in fact depriving his creditors of the means of making their claims out of his property. The condition of a debtor making a voluntary conveyance as to solvency, is what the law regards, and not his belief. The most vital question in this case, perhaps, after determining the condition of Silas R. as to solvency, is as to whether or not the conveyance was made to his son for a valuable consideration or whether it was a mere gift. We have examined the record carefully on this point and have come to the conclusion from the evidence therein and all the circumstances surrounding the transaction, that the conveyance was a gift of the interest of Silas R. Austin in the land, about three thousand to four thousand dollars being its value in excess of mortgages on it. The master finds from the evidence that the land at the time of the conveyance was worth \$35 per acre, amounting to \$7,700. Silas R. Austin himself swears that it was worth that amount, but the great weight and preponderance of evidence is that it was worth \$40 per acre. The land was incumbered by two mortgages, aggregating about \$4,500. The contention of Marion L. Austin, one of the appellants, is, that he purchased the land of his father for \$100, and an agreement with him to pay off the mortgages then on the land, making about \$4,600, possibly a little over. The deed on its face shows that the consideration was \$100, subject to the incumbrances on the land. Marion L. Austin testifies that he paid to his father the \$100 mentioned in the deed; but his evidence on cross-examination is very unsatisfactory about the circumstances of the payment, how and where he got the money to pay the \$100, and the time he paid it and the various circumstances connected with it. He states at first that he got twenty-seven dollars of the money from the sale of cattle and the balance by the sale of other stock, cattle and hogs, and then afterwards that he borrowed fifty or sixty dollars of the money; and when his attention was called to this on cross-examination, he states that he forgot about borrowing the money at the time.

Marion L. paid the interest on one of the mortgages existing at the time of the conveyance to him, in the next fall afterward, \$150, and he got this money from his father; and then it developed in his testimony that his father had owed him substantially this amount prior to the execution of the deed to him. Why he did not turn the \$100 he claims to have given for the land against this indebtedness to him of \$150, he fails to state. It appears also that the \$100 was not paid at the time the deed was made, and perhaps for a couple of months afterward, the month in which it was paid or circumstances not remembered, and it was not paid until after this suit was commenced. It appears also that Silas R. Austin knew that the land was worth thirty-five dollars per acre, and if he had been intending to make a sale of the land at all he would have sold it for something near its value. And if he was not intending to sell the land for its value it would have been natural for him to have said something about it to his son, whether he was giving him three thousand to four thousand dollars or not, but nothing of the kind appears in the evidence. In addition to this, there is the testimony of Jackson, the cashier of the bank, the defendant in error, who swears that he had a conversation with Marion L. Austin a short time after the assignment in which Marion L. admitted to him that the deed was executed from his father to him without any consideration, and that he took the title to the land for the purpose of helping his father to save something; that William S. Austin and his partner were "going to sticks." Marion L. denies this conversation, it is true, but the circumstances make the statements made by Jackson appear probable and reasonable. Jackson is a disinterested witness, so far as appears from the evidence, and Austin a deeply interested one. Another important circumstance in the case is that while Silas R. Austin was on the witness stand, called by his and Marion L.'s attorneys, and questioned in regard to the good faith of the transaction—whether the deed was made with intention to defraud his creditors—he was not interrogated on the very vital and important question at issue,

whether he was paid or agreed to be paid any consideration for his interest in the land by his son, or whether the \$100 was paid or agreed to be paid to him. Under the circumstances, Marion L. Austin's evidence having been so directly contradicted by his own admissions, as sworn to by Jackson, it would seem that such evidence would have been on the part of Silas R., if he could have corroborated his son as to the payment, of the highest importance.

The fair inference would be that he could not corroborate his son on the question of the payment of the \$100, or his undertaking to pay off the prior mortgages.

Another fact appearing in the case was the absence of any agreement in the deed, or provision, that Marion should pay those mortgages. He simply took the warranty deed, subject to the mortgages, which would leave him an option whether he would ever pay them or not; and it is more than probable that the deed expressed the real intention in that regard. No attempt was ever made, at the time of the transaction or since, to take up those notes and substitute his own. All the circumstances considered, we think it clearly appears from the evidence if the deed was not made with actual fraudulent intent, that it was a mere gift from the father to the son of his interest in the land without exacting any terms of purchase. If that be so, legal fraud on the part of Silas R. and Marion L. Austin would be established, no matter what their actual intentions were. There are many circumstances connected with the case that would indicate that Silas R. Austin had a strong suspicion, founded on facts some way coming to his mind, that William S. Austin was about to fail, and that he thought it best, in order to save something, to deed the land to his son, and that this fact was communicated to the son.

The evidence discloses that William S. had made this \$3,600 note as a sort "of a pacifier," as Silas R. swears, and the mortgage on the Kansas land, and delivered them to him on the 27th day of March, 1891, three days before the deed to his son; that the deed had been talked of and under consideration for some days before it was executed; that

Silas R. was not in good health ; that the deed, after being executed in the forenoon, was taken to the county seat, eight miles distant, and filed for record at 4:25 P. M. Of course all this might have happened and the intentions been honest. Silas R., however, swears that he had faith in the solvency of William S., and that the deed was not made with any actual fraudulent intent, and his evidence appears to be frank and open and nothing about it that justifies us in disregarding it. Taking this view of the evidence and the law, we regard the conveyance as fraudulent in a legal point of view and that the court below did not err in sustaining the master's report in such finding and in rendering the decree subjecting the land to sale under the executions issued on defendant in error's judgments except as we will hereafter decide.

We will notice now some legal points raised. It is not required, as thought by counsel for plaintiffs in error, that execution should have issued on the judgments in question and been returned *nulla bona*. The judgments in these cases were liens on the equitable interest of Silas R. Austin, and the object of this bill was to remove the conveyance to his son, as fraudulent. In such case equity has jurisdiction. *Miller v. Davidson*, 3 Gilm. 522; *Weightman v. Hatch*, 17 Ill. 287; *Newman v. Willetts*, 52 Ill. 102.

The question of the extension of the time of the notes being a release of the judgments is not of importance here. If any such defense had any support in the evidence it is of no consequence for the reason that full consent was given in the notes and powers of attorney to confess judgments, to the extension of time of the payment of the notes without the consent of either party, and that it should not operate as a release to either party. We think the release of the judgment against Dennis Austin, executed by defendant in error as to Dennis' land, was sufficiently identified by the evidence as being the same judgment in this suit. Furthermore, we regard the release as immaterial, as the money received from Dennis was put in the hands of appellee on the judgment sought to be collected in this suit against

Dennis and Silas R. Austin, and it would not matter whether there were any formal release of Dennis' land by defendant in error. This point made by counsel for defendant in error is therefore overruled.

There is one more important question in principle that we will now notice, though it may, or may not be of benefit to the plaintiffs in error in the final outcome of the case. It is the following: The plaintiffs in error object to the sustaining the exception of defendant in error to the master's report finding the judgment to which Dennis Austin was a party defendant paid and satisfied. It appears that his judgment, interest and costs amounted to \$1,348.43; that Silas R. Austin and Dennis Austin were co-securities on the note on which the judgment was obtained, for the principal, W. S. Austin. The judgment of defendant in error became a lien on the lands of Dennis Austin, and Dennis Austin being indebted to the defendant in error on another judgment of about \$1,600, and to a considerable amount to other parties, was permitted by defendant in error to raise a sum of money on this land by mortgage to pay off these debts and satisfy the liens. When the money was raised, it was placed in defendant in error's hands and the judgments released.

It appears by the evidence of Jackson, the cashier, and Dennis Austin that a sum of money equal to the judgment in question was placed in Jackson's hands, as agent of the bank, to be held as they say as security for the payment of this judgment, sought now to be collected, then already overdue, out of the property of Silas R. and Marion L. Austin. The intention of the parties is plain enough to be seen; it was to keep the judgment in question unsatisfied, so that it could be collected by means of this suit and execution issued on the judgment from Silas R. Austin's estate, and if that should be accomplished the money so placed in the cashier's hands by Dennis Austin would be handed back to him; if they should fail in its collection then the judgment was paid; the bank would have the power to apply it at any time. This suit was then pending, and afterward, in reality,

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as far as this judgment is concerned, was and is prosecuted for the benefit of Dennis Austin. The defendant in error is an indifferent party, disinterested.

As between Silas R. and Dennis Austin, each is equally bound to pay one-half of this judgment and costs. This rule is established on equitable principles. It would be highly inequitable to allow the bank to collect this entire amount of Silas R. Austin for the benefit of Dennis Austin, but it would be equitable that Silas R. should pay one-half of it. Therefore we hold that the bank has been paid, or should apply, one-half of this money to the payment of the judgment, interest, and costs in question. This is no hardship on the defendant in error, because when they fail to collect this one-half, all they have to do is to apply the money put in its hands by Dennis Austin to the payment of the other half. It is not like a case where one holds for security personal property requiring foreclosure before the debt can be realized. The only foreclosure in this case required is to use the money, the authority for which it already has. The debt is in fact paid to that extent and in equity should be so regarded. The court was therefore partly right and partly in error in sustaining the exceptions to that portion of the master's findings. The court should have overruled the exception as to one-half. It appears from the evidence that the claim of the defendant in error of all the judgments in question have been proved up against the estate of William S. Austin in the hands of the assignee. After the payment of this judgment in question, when the claim for it is collected of the assignee, or any proportion of it, then after the full payment of this claim by the securities in equal proportion they will each be entitled to be subrogated to the rights of the bank and each receive one-half of whatever is paid on such claim. The same would be the case as to any other collateral, if any, held by Silas R. Austin for the benefit of the securities of this note; for security held by one is for the benefit of all other securities.

The decree ought, therefore, to be modified so as only to allow the sheriff to collect one-half of the judgment above

named out of the real estate deeded to Marion L. Austin. It appears also that Marion L. Austin has paid \$150 interest on the mortgage to the Morrison Literary and Scientific Association. This payment was made under claim of ownership of the land and paid under circumstances where the original deed from his father was not made with any actual fraudulent intent, only legal fraud; and if he had not paid, the defendant in error would have been compelled to pay it to prevent a foreclosure, and therefore we deem it no more than equitable that Marion L. Austin should be subrogated to the rights of the Morrison Literary and Scientific Association, and that he be reimbursed out of the first moneys realized from the sale of the equity of redemption in the land; also, the same as to any taxes he may have paid on the land since acquiring a deed. We, therefore, affirm the decree of the court below in all respects except as above indicated, and that the cause be remanded, with directions to the court below to so modify the decree as to only allow the collection of one-half of the judgment interest and costs of the judgment to which Dennis Austin is a party, and to require the payment of \$150 to Marion L. Austin out of the first moneys received on the sale of the lands and also the amount of any taxes he may have paid on said lands after the date of his deed, March 30, 1890, and that defendant in error pay the costs of this case made in this court.

Decree affirmed in part and reversed in part.

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ELGIN, JOLIET & EASTERN RAILWAY COMPANY

V.

MABEL RAYMOND, BY NEXT FRIEND, ETC.

Railroads—Action by Infant for Personal Injury—Sufficiency of Evidence—Instructions—Evidence—Excessive Verdict—Remittitur in Appellate Court.

1. In an action brought by a child of tender years, by next friend, to recover damages for a personal injury alleged to have been caused by

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negligence of defendants, evidence that plaintiff's mother was pregnant was admissible, on the theory that plaintiff was responsible for his mother's negligence, on which theory the case was tried, to show that the mother was unable to give her child more attention.

2. Whether plaintiff in such action could be held responsible for her parents' negligence, *quære*.

[Opinion filed June 15, 1893.]

APPEAL from the City Court of Aurora; the Hon. R. P. GOODWIN, Judge, presiding.

Mr. CHARLES WHEATON, for appellant.

Messrs. C. I. McNETT and ALSCHULER & MURPHY, for appellee.

Per Curiam. This is an action in case by appellee, a minor, who sues by her next friend, George H. Raymond, her father, to recover for injuries sustained by her in the city of Aurora, at a crossing of appellant's railroad over Prairie street in said city, on October 3, 1892, on account of alleged negligence of appellant, 1st, by its servants in backing and running its train at a greater rate of speed than ten miles per hour, contrary to the ordinance of the city of Aurora; 2d, general negligence in running its train; 3d, in negligently constructing its crossing, by leaving an improperly wide space between the planking and the rail at the crossing, also in leaving improper depth without filling to prevent persons crossing from getting their feet caught in such space; 4th, in not ringing a bell or sounding a whistle as required by statute before reaching a crossing; and 5th, in willfully running the engine on appellee, Mabel Raymond. The injury was occasioned as follows: The appellee, a child of about five years of age, accompanying her sister, about seven years old, while crossing the track at the above named place in returning home from school, got one of her feet caught in the space between the planking and the rail, and being unable to extricate herself by either her own ex-

ertions or that of her sister, was run over by appellant's train while backing over the crossing, and her leg was so crushed and nearly severed from her body as to require amputation just below the knee, her sister being killed.

It is insisted that the evidence on most of the counts in the declaration was not sufficient to warrant instructions being given on the hypothesis of the allegations therein contained. We think, however, the court was warranted in giving the instructions based thereon. We think also that the evidence at least justified the verdict of the jury in favor of appellee on the charge that the train was being backed and run at a greater rate of speed than ten miles per hour, which was prohibited by the ordinances of the city of Aurora, saying nothing of the charges in the other counts of the declaration. The evidence admitted on behalf of appellee, against appellant's objection, of appellee's mother being in a pregnant condition, disabling her from overseeing and caring for appellee to any greater extent than she did to prevent accidents of the nature of this one, was not, in our opinion, erroneous under what was assumed in the instructions of both parties to have been the law, *i. e.*, that appellee was responsible for any negligence of her parents in not guarding and protecting her against accident. There was no evidence showing any injury to her mother on account of shock or otherwise at the accident. It went no farther than to show she was in a disabled condition by reason of the cause named, and the evidence was limited by the court to that proof. It is very doubtful whether as a matter of law appellee, where suing in her own right for injuries done to herself, would be held responsible for any negligence of her parents in failing to use proper care in guarding her against accident. *Chicago City R. W. Co. v. Wilcox*, 33 Ill. App. 450, and authorities cited. There was no error in refusing any of appellant's offered instructions refused by the court, nor was there any inconsistency between the general and special verdict of the jury. On the entire evidence we think the jury were justified in returning a verdict for appellee. The verdict, however, in this case

Furnish v. Rogers.

was for \$15,000, which we deem excessive, considering the age and condition of the appellee and probability of her success in life had no accident happened, but as the appellee now comes into court and offers to remit \$5,000, we accept the remittitur and affirm the judgment of the court below for the sum of \$10,000. Judgment affirmed to that amount, and the costs of this court is assessed against appellee.

Judgment affirmed.

JESSIE M. FURNISH' ET AL.

V.

C. D. ROGERS, ADMINISTRATOR, ETC., ET AL.

Jurisdiction—Construction of Will—Freehold Involved.

Upon a bill filed to procure the construction of a will where the contention of complainants was that the will should be so construed as that one of the complainants became the absolute owner in fee of real estate devised by the will, which contention was disputed by defendants, *held*, that a question of freehold was involved and that an appeal from the decree of the Circuit Court should have been to the Supreme Court.

[Opinion filed June 28, 1893.]

APPEAL from the Circuit Court of DeKalb County; the HON. CHARLES KELLUM, Judge, presiding.

Mr. HARVEY A. JONES, for appellants.

Mr. C. D. ROGERS, for appellees.

MR. JUSTICE LACEY. This was a bill in equity brought by the appellants against appellees, asking a construction of the will of Benjamin Page, deceased, and, at the same time, asking the sale of certain real estate situate in DeKalb County, Illinois, supposed to be bequeathed by the said will

to Kathleen Furnish, a minor, residing in Umatella County, Oregon, and by said petition and application sought to be sold by order of the court and the money arising therefrom paid to and reinvested in Umatella County, Oregon, by W. J. Furnish, her guardian, appointed by the County Court in said county.

The purpose of the bill, besides asking for and procuring the sale of the said real estate, was to procure a construction of the will by the Circuit Court as respects the interests of said minor and her mother, Jessie M. Furnish *nee* Starkweather, concerning the title of the real estate involved and claimed by the said minor, and also as to certain moneys claimed by said minor under the same will, and asking the payment of it to her guardian from the hands of C. D. Rogers, administrator, with the will annexed, of the estate of Benjamin Page, deceased, late of said County of DeKalb. The other parties were beneficiaries under the will and their interests need not be named. Jessie M. Furnish, who joined her husband in the petition, was the grandniece of the deceased and had intermarried with said W. J. Furnish, and the said Kathleen Furnish was the only child of said W. J. and Jessie M. Furnish. The portion of the will in question is as follows, viz.:

"I give and bequeath to my grandniece, Jessie Starkweather, now with me, my house and two lots in Sycamore, where I now reside, in block 8. Also 32 acres in Mayfield, DeKalb County, Illinois, and \$500, all of which is to go to her children should she marry; if she should die childless, then it is to be divided between her mother and the rest of my grand nieces and nephews, who will appear and give evidence of such. * * * It is my desire to give to Jessie Starkweather \$500 in addition to the former bequest, both to remain on interest in a thousand dollar mortgage."

Upon the coming of the petition and bill to be heard, C. D. Rogers demurred to it, which demurrer was sustained by the court, and the complainants standing by this demurrer, the bill was dismissed by the court at complainant's costs. From this decree this appeal is taken to this court and a reversal asked of said decree. The Circuit Court, it

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will be seen, not only dismissed the bill so far as the relief against Rogers, the administrator, was concerned, but also so far as the rights of the appellants are concerned, touching the title to and the sale of the real estate. It is asked of this court to give a construction of the will and to decide whether or not said minor is the owner of the real estate under the will, as well as the money, and to reverse the decree and order the Circuit Court to grant the relief prayed for. It appears to us that a freehold is directly involved in this case. The contention of appellants is that the will should be so construed as that the child of Jessie M. Furnish as soon as she was born became the absolute owner in fee of the real estate and money bequeathed, mentioned in the will. On the other hand, it is contended that the will, properly construed, grants to Jessie M. Furnish all the property during her natural life, and at her death the property shall go to such issue of said Jessie as may then be living, and if none of her children be living, then to the grand nieces and nephews of the testator. By the decree of the court below the said complainant, Kathleen Furnish, was denied any right in the land as well as the money; *i. e.*, the remedy she sought, depending on the proper construction of the will, was denied her.

This appeal should have been taken directly to the Supreme Court, which is alone competent, under the statute, to pass on a case where a freehold is involved. The appeal taken in this case is therefore dismissed.

Appeal dismissed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS

FOURTH DISTRICT—AUGUST TERM, 1892.

WILLIAM FRANK AND LUDWIG PAPE
V.

THE PEOPLE OF THE STATE OF ILLINOIS, FOR USE, ETC.

*Administration—Administrator's Bond—Suit on—Final Report—
Sufficiency of—Limitation Act, Sec. 16.*

1. An action on an administrator's bond is not required to be brought within ten years after the execution of the same, but must be brought within such time after a right of action accrues thereon, which takes place upon a breach of a condition thereof.

2. Until a valid order of distribution is made in a given case, the administrator is the trustee of the estate for the benefit of the creditors and heirs, and until an order of distribution is made, no cause of action accrues to the heir.

3. No order of record, as an approval by the court of a final report, having been entered in a given case, the same being approved by the judge by his indorsement thereon, such act does not constitute a final settlement.

4. A court has no power to make an order of distribution without notice to the heirs, and an order so made would be null and void.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Madison County; the
Hon. B. R. BURROUGHS, Judge, presiding.

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Frank v. The People.

Appellant, William Frank, became administrator of his brother, Frederick Frank, and filed his bond as administrator, December 19, 1876, with his co-appellant as surety. Frederick Frank, at the time of his death, left surviving, William Frank, a brother of the whole blood, and appellees, for whose use the suit was brought, brother and sister of the half blood. It does not appear that any inventory was filed by the administrator, and on the 19th day of February, 1879, the administrator presented to the Probate Court of Madison County, a final report, which was approved by the judge by his indorsement thereon, but no order entered of record as an approval by the court. At the time the report which purported to be a final report was presented and approved by the judge, no notice of final settlement was given, but at the time of that attempted final settlement, a report was made as follows: "He further reports that the debts and claims against said estate have all been paid, leaving the above balance to be distributed between the heirs lawfully entitled thereto as follows: To William Frank, only brother of the deceased and the administrator of said estate, \$1,594.65. Now moves the court that he may be allowed to make distribution as above set forth, and having made and taken receipts therefor and presented to this court asked to be discharged." In June, 1890, a suit was brought on the bond for the use of appellees and the questions of law and fact, as presented by the record, are as to whether the report of the administrator is valid and binding. In June, 1890, a citation was issued against the administrator requiring him to file an account as administrator. To that citation he answered, setting up that he had made a final settlement more than eleven years previous and moved that an order of approval be entered *nunc pro tunc*. As of the date of filing his pretended final report, the appellees, for whose use the suit was brought, filed exceptions to the report made in 1879, and on a hearing in the County Court the exceptions were sustained and the administrator charged with sums in addition to those in his so called final report and his motion for an order *nunc pro tunc* denied.

On appeal to the Circuit Court that judgment and order of the County Court was affirmed and the sum of \$2,765.92 was found to be in the hands of the administrator for distribution, and distribution ordered of the same; which order was made at the October term, 1891, of the Circuit Court of Madison County.

The administrator failing to make distribution, suit was brought on the bond on March 4, 1892, and the breaches assigned were the failure to pay over the money in accordance with the order of the Circuit Court, made in October, 1891, and second, that on February 19, 1879, and prior to that time, divers rights and credits, goods and chattels came to the hands of the administrator which he failed to pay over. To this declaration pleas of *non est factum nul tiel* record and the statute of limitations were filed, to which pleas, general replication were filed. By a stipulation filed it is shown that one of appellees for whose use the suit was brought was born September 16, 1856, and another July 27, 1858, both of whom are females, and the other, a male, born February 18, 1863. A finding and judgment was rendered for appellees in accordance with the amount found to be due and ordered to be distributed, one-fourth of the amount to each of the appellees, and from the judgment so rendered the administrator and his surety prosecute this appeal, and the question arising on the assignment of errors is on the plea of statute of limitations.

Messrs. JOHN G. IRWIN and HADLEY & BURTON, for appellants.

Messrs. DALE, BRADSHAW & TERRY, for appellees.

MR. JUSTICE PHILLIPS. Sec. 16 of the limitation act provides that action on bonds shall be commenced within ten years next after the cause of action accrued. Actions on bonds of administrators are not required to be brought within ten years after the execution of the bond. No action accrues on such bond until there be a breach of the condition. *Bonham v. The People*, for use, etc., 102 Ill. 434.

Order of Iron Hall v. Moore.

Section 112 of the chapter on administration requires administrators to exhibit accounts of their administration for settlement to the County Court at the expiration of the first year from the time of appointment, and every twelve months thereafter until the duties of administration are completed, and then provides "that no final settlement shall be made and approved by the court unless the heirs of the decedent have been notified thereof in such manner as the court may direct." Under the provision of the statute no final settlement could be made without notifying the heirs of the decedent, and it is not claimed that such notice was ever given. Until a valid order of distribution is made, the administrator is the trustee of the estate for the benefit of the creditors and heirs, and until an order of distribution is made, no cause of action accrues to the heir. The action of the administrator in making the report to the judge of the County Court, but such order not being made of record as an order of court, did not constitute a final settlement, and even the court would have no power to make an order of distribution without the notice to the heirs, and an order so made would be null and void. *Long, Administratrix, v. Thompson, Guardian, et al.*, 60 Ill. 27.

This action being on the bond of the administrator, and the breach of the condition of the bond as to paying over to distributees money to which they were entitled occurred within ten years.

The judgment is affirmed.

THE SUPREME SITTING OF THE ORDER OF THE IRON
HALL

V.

MARQUIS D. MOORE.

Mutual Benefit Associations—Forfeiture of Charter of Subordinate Lodge—New Trial.

1. It not appearing that any exception was taken in the trial court

to the overruling of a motion for a new trial, this court will not consider certain alleged errors assigned, upon appeal.

2. In an action brought by a member of a subordinate lodge of a mutual benefit association, said association having sought to forfeit the charter of the former in an illegal manner, in view of its constitution this court holds that such action did not operate to relieve it from liability to the plaintiff, and that the judgment in his favor can not be interfered with.

[Opinion filed March 3, 1893.]

IN ERROR to the Circuit Court of Madison County; the
Hon. B. R. BURROUGHS, Judge, presiding.

MESSRS. NATHAN FRANK and DALE, BRADSHAW & TERRY,
for plaintiff in error.

MESSRS. TRAVOUS & WARNOCK, for defendant in error.

MR. JUSTICE PHILLIPS. Plaintiff in error is a body corporate, organized under the law of the State of Indiana, for the purpose, among other things, to provide for the payment to the members, benefits not exceeding \$1,000, under certain conditions. It has power to organize subordinate and local lodges, and in March, 1882, local branch No. 99 was formed at Nameoki, in the county of Madison and State of Illinois, of which branch defendant in error was a member, and on March 27, 1882, a relief fund certificate was issued to him which provided that in case he should pay all assessments made against him on that certificate for the term of seven years and maintain himself in good standing in the order, then he should be entitled to a sum not exceeding \$1,000, less any benefits paid him on account of sickness, and defendant in error brought suit on that certificate. And, as appears from the evidence in this record, he complied with all that was required of him so far as he was permitted by plaintiff in error. On November 24, 1888, about three months before this certificate matured, the supreme justice of the order, without any previous notice to the local branch of which defendant in error was a member, declared that local branch

Order of Iron Hall v. Moore.

to have forfeited its charter and all benefits to its members within the order, because of alleged non-compliance with demands from the chief officers, and so far as appears from this evidence, there was no authority in the constitution or by-laws of the order authorizing such declaration of forfeiture without notice.

Defendant filed a plea in abatement to the return of the writ and issue joined thereon and trial had before the court, and the court found the issue for the plaintiff, on defendant's plea in abatement. The first error assigned is: "The court erred in finding the issue for plaintiff on defendant's plea in abatement to the service of the writ. The evidence on which the court found on that issue is not preserved in the record; nor does it appear that any exception was taken to the finding or judgment of the court. Plaintiff thereupon filed a plea of the general issue, and a special plea setting up the facts of the forfeiture of the charter of the subordinate lodge of which defendant in error was a member, and avers that by reason of such forfeiture, the said order was released from all demands and causes of action which the plaintiff then had against it. To this plea a demurrer was interposed and sustained. And the second error assigned is: The court erred in sustaining plaintiff's demurrer to defendant's special plea. It appears from the constitution and by-laws of the order that no charter of any local board shall be forfeited until the local branch shall be notified and afforded a hearing.

The plea to which demurrer was sustained, while averring that the charter had been forfeited, does not aver any fact with reference to notice that would give jurisdiction to the Supreme Sitting to declare a forfeiture, and hence the demurrer was properly sustained to the plea. On the issue made by the plea of general issue, a trial was had before the court without a jury and a finding and judgment was rendered for the plaintiff in the sum of \$975, with costs. The other assignments of error are: Third: The court erred in admitting improper and illegal evidence for the plaintiff on the trial of said cause. Fourth: The court erred in pro-

nouncing judgment in favor of plaintiff in the sum of \$975, and costs of suit, or in any sum whatever. Fifth: The court erred in not finding the issue on the trial for defendant. Sixth: The court erred in overruling defendant's motion for a new trial. We are precluded from a consideration of the last four errors assigned, as it appears from the bill of exceptions and judgment, both, that no exception was taken to overruling a motion for a new trial, and as the record fails to show such exception the question presented by these assignments is not before us.

Judgment is affirmed.

ANTONY M. BOURDEAUX, SUPERVISOR,

v.

L. A. COQUARD.

Municipal Corporations—Laws of 1841, Sec. 4, Page 65—Cahokia Commons.

1. A municipal order not having been indorsed by the payee to the holder thereof, any defense may be set up against the same, if the trustees who signed it had power to issue it, against the holder, even though he purchased for value, as could have been made against the payee; and although the order was payable in a given case to a person named or bearer it can not be transferred by delivery so that any defense will be cut off that could be made against the payee.

2. Municipal corporations of the character referred to in the case presented can exercise no other powers than such as are expressly granted, or necessarily implied from the statutes that created them, to carry into effect the power granted.

3. A municipal corporation has no inherent power to issue commercial paper, and has no right to do so unless such power is granted in the charter thereof. Persons dealing in such paper must see that the power exists. The trustees in the case presented had no authority to issue the order in question.

[Opinion filed March 3, 1893.]

IN ERROR to the Circuit Court of St. Clair County; the
Hon. A. S. WILDERMAN, Judge, presiding.

Bourdeaux v. Coquard.

Mr. WILLIAM WINKELMANN, for appellant.

Mr. CHARLES P. KNISPEL, for appellee.

MR. JUSTICE PHILLIPS. Appellee brought suit against appellant as supervisor of the village and commons of Cahokia on the following order:

"STATE OF ILLINOIS, }
County of St. Clair. } ss. CAHOKIA, ILL., Sept. 5, 1888.
\$225.00.

Peter Godin, supervisor of the village and commons of Cahokia, in said county. Pay to Porter Lenard, or bearer, the sum of two hundred and twenty-five dollars, out of any money belonging to school funds in said village, with eight per cent interest from date. By order of the board of trustees of said village.

ANDREW PALMIER,
Clerk.

PETER QUANTIN.
LOUIS PALMIER,
President."

"No. 16,934."

At the time the order was drawn, one Peter Godin was the supervisor of Cahokia, and accepted the order by writing across it:

"Peter Godin, supervisor. P. O. address, Cahokia, Ill."

The defendant, Bourdeaux, as supervisor, is the successor of Godin. The defendant objected to the order being read in evidence because the same had not been indorsed by the payee. The objection was overruled and defendant then and there excepted. The declaration in declaring on the order does not bring the suit for the use of the plaintiff in the name of the payee, nor does the order appear to have been indorsed by the payee.

The declaration contains a special count and the common counts; to the common counts the defendant pleaded the general issue, and to the special count filed special plea, averring that the said trustees had no power or authority to issue and deliver the order aforesaid, to which special plea the defendant filed replication, saying they did have

power to do so. The defendant further pleaded to the special count, alleging that the trustees of the village and commons of Cahokia at the time of the execution and delivery of the order entered into an agreement with the payee that said order should be executed and delivered; that said payee was to sell the same and pay said trustees \$100 therefrom, and that the lightning rods in the order mentioned were sold for \$100. A further plea was filed denying that the lightning rods in the order mentioned were ever delivered to the trustees. To these two pleas a demurrer was interposed by the plaintiff and sustained, and to sustaining the demurrer, defendant excepted. The order not appearing to have been indorsed by the payee to the plaintiff, any defense might be set up against the order if the trustees had power to issue the same, against the plaintiff, even though he purchased for value, as could have been made against the payee. *Turner v. The Peoria & Springfield Railroad Company*, 95 Ill. 134; *Garvin v. Wiswell*, 83 Ill. 215; *Roosa v. Crist*, 17 Ill. 450; *Hilborn v. Artus*, 3 Scam. 344; *Rabberman v. Muehlhausen*, 3 Ill. App. 326. And although the order was payable to Lanard or bearer, it could not be transferred by delivery, so that any defense would be cut off that could be made against the payee; that it was error to sustain the demurrer to the pleas, and it was also error to allow the order in evidence under the averments of the declaration.

A finding and judgment was rendered by the court for plaintiff for \$265. The law authorizing the election of the trustees, their power and duties, is found in Sec. 4 of the laws of 1841, page 65. See *Bowman's Compilation*, page 10. The section reads as follows:

“The proceeds of the commons so leased as above shall, after defraying the expenses of sale, be appropriated to the education of the children of the inhabitants of the village of Cahokia and for no other purpose whatever; to effect said object the inhabitants of said village shall elect three trustees annually, whose duty it shall be to provide a school house or houses and employ a teacher or teachers suitable

and competent for the instruction of the pupils; said trustees shall have power to receive from the supervisor or lessees the amount of money due annually from the rents of said commons and transmit the same to their successors in office, should there be any in their hands, and shall moreover be required at the end of every year to render an account to the inhabitants of said village of all moneys which came to their hands, of the amount paid for tuition and school houses and the number of children taught. "Under this statute the trustees derive all their power, and municipal corporations of this character can exercise no other powers than such as are expressly granted or necessarily implied to carry into effect the power granted." *Glidden v. Hopkins*, 47 Ill. 529; *School Directors of District No. 3, T. 9 N., R. 8, v. Fogleman*, 76 Ill. 189; *Peers v. The Board of Education of School District No. 3, etc., v. Madison Co.*, 72 Ill. 508.

The statute under which these trustees derived their power prescribed their duty, which is, "To provide a school house or houses and employ a teacher or teachers suitable and competent for the instruction of pupils." And they owe a further duty of transmitting to their successors in office any money which may come to their hands that is not necessarily used in providing school houses, and teachers, and to perform the duties prescribed they have power to receive from the supervisor or lessees of the commons the amount annually due for rents, and apply such sum as may be necessary to pay for school houses or teachers. Under this prescribed power they can not purchase property on time, borrow money, nor issue commercial paper. In *Hewitt v. Board of Education*, 94 Ill. 528, it was held, "Where a corporation is created for business purposes all persons may presume such bodies when issuing their paper are acting within the scope of their power. Not so with municipalities. Being created for governmental purposes, the borrowing of money, the purchase of property on time and the giving of commercial paper are not inherent or even powers usually conferred, and unless endowed with such

power in their charters they have no authority to make and place on the market such paper, and persons dealing in it must see that the power exists. This has long been the rule of this court." The power to receive and pay out moneys does not include the power to issue interest-bearing commercial paper; nor does it include the power to purchase property where no money is on hand to pay for the same. That the trustees had no authority to issue this order and it was error to enter judgment on the same.

The judgment is reversed and the cause remanded.

Reversed and remanded.

LOUIS GRIFFIN

V.

STEPHEN KIRK.

Forcible Detainer—Accretion—Sand Bar—Riparian Rights—Title—Evidence—Action by Tenant.

1. Deeds under which a party claim may be read in evidence in an action of forcible detainer for the purpose of showing the boundaries or extent of possession.

2. Where actual possession of a part of premises is shown to be in the plaintiff in an action of forcible detainer, the plaintiff's deed is proper evidence for the purpose of showing the extent of his possession.

3. The possession of a riparian proprietor is to the center thread of a given stream to as full an extent as if expressly included in the terms of the deed under which he claims, and he may maintain replevin for sand or gravel taken therefrom by a trespasser who invades that possession.

4. A person in possession of lands abutting upon a stream may maintain forcible detainer against one who invades his possession of lands acquired by accretion.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Randolph County; the Hon. B. R. BURROUGHS, Judge, presiding.

47	258
181	378

47	258
181	437

47	258
91	50
91	51

47	258
97	4812

Griffin v. Kirk.

Messrs. GORDON & ALLISON and WARREN N. WILSON, for appellant.

Messrs. H. CLAY HORNER and ALEXANDER HOOD, for appellee.

MR. JUSTICE PHILLIPS. Appellee filed a complaint in an action of forcible detainer to recover certain lands in the complaint described, and on trial a finding and judgment was rendered for the plaintiff. Appellee was in possession of a certain tract of land a part of an island in the Mississippi river, which, as originally surveyed by the government, was surveyed as being in Illinois, and the land of which plaintiff was in possession was a tract on the west side of said island. The river on both sides of this island was navigable, but some time between 1865 and 1870 a sand-bar, or as termed by the witnesses, a tow-head, formed in the river between the island and the Missouri shore, which is separated from plaintiff's tract by a slough, which is sometimes dry and sometimes contains water. Timber is now growing on the sand-bar or tow-head, and it is separated from the Missouri bank of the river by the western channel of the Mississippi. One McBride, the owner of land on the Missouri side of the river, asserting some claim to this sand-bar, the defendant Griffin, claiming to be his tenant, took possession of a portion of the same and plaintiff brought this action to dispossess him. The questions presented by this record are as to the nature and extent of plaintiff's riparian rights, and whether forcible detainer may be maintained in such case.

The question of title is not involved in this proceeding. It appears from the evidence that Samuel Mausker was in possession of the southeast fractional quarter of section 5, township No. 8 south, of range No. 6 west, in Randolph County, Illinois, a tract of 108 acres. An execution and sheriff's deed was offered in evidence to show the sale of this tract of land on execution against one Alfred Puckett, the patentee, and the purchase of the same by Samuel Mausker, in 1861. No judgment was offered in evidence, and it is not

necessary for us to determine the effect of the execution and sale thereunder as conveying a legal title. It is well settled that in this action title is immaterial except for the purpose of showing the extent of possession. Deeds under which a party claims may be read in evidence, however, in an action of forcible detainer for the purpose of showing boundaries or extent of possession. *Brooks v. Bruyn*, 18 Ill. 539. Mausker took possession and built a house on the 108 acres and cleared it and lived in the house.

Where actual possession of a part of premises is shown to be in the plaintiff in an action of forcible detainer, the plaintiff's deed is proper evidence for the purpose of showing the extent of his possession. *Huftalin v. Misner*, 70 Ill. 205.

Mausker, while in possession of the 108 acres, claimed the timber growing on the sand-bar or tow-head as belonging to him by reason of the accretion and controlled the sale of timber therefrom. Mausker died about 1885, and his executors, under a power in the will, sold and conveyed the fractional southeast quarter of section 5, township 8 south, range 6 west, containing 108 acres—to the plaintiff in this suit, who entered into possession of that tract. It was not error to admit in evidence the deed to Mausker, and the deed from Mausker's executors to plaintiff. This fractional quarter section of which plaintiff is in possession is the tract by which the plaintiff claims the tow-head as an accretion. The survey of the land described in plaintiff's complaint is made by projecting the lines from the shore to the center of the stream, so as to give the adjoining proprietor a portion of the accretion to a center thread of the stream in proportion to his shore line, and the possession of a riparian proprietor is to the center thread of the stream to as full an extent as if expressly included in the terms of the description. And he may maintain replevin for rock or gravel taken therefrom by a trespasser who invades that possession. *Braxon v. Bressler*, 64 Ill. 488.

And the riparian proprietor owning to the center thread, unless the grant shows a contrary intention, gives him the

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use and appropriation of ice as an accession to his land and he may maintain trespass *quare clausum fregit* against any stranger who invades that possession. The Washington Ice Company v. Shortall, 101 Ill. 46. And as a necessary consequence it must be held that his right to recover in trespass in such cases is by reason of his ownership of the particular tract carrying his possession to the thread of the stream. A lease of the entire tract so abutting on a navigable river would necessarily carry the tenant's possession to the riparian rights of property so abutting. That the tenant might maintain an action for a trespass on his possession and one in possession of such tract may maintain forcible detainer against one who invades his possession of lands acquired by accretion.

We find no error in the record and the judgment is affirmed.

Judgment affirmed.

DWELLING HOUSE INSURANCE COMPANY, OF BOSTON,
MASSACHUSETTS

v.

JAMES JONES.

Fire Insurance—Policy—Conditions—Breach of—Waiver.

This court reverses the judgment for the plaintiff in an action upon an insurance policy, assured having failed to furnish sworn proofs of loss within thirty days after the goods in question were burned, the furnishing of such proofs being, under the policy, a condition precedent to the right of recovery, no waiver having been made.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Richland County; the
Hon. B. R. BURROUGHS, Judge, presiding.

This was an action brought upon a policy of insurance which included a period of time from July 8, 1890 to July

8, 1895, upon certain household furniture in a certain building; the amount of the policy was \$300, and was issued upon the written application of the assured, made to the company through its agent, one Miller. On January 11, 1891, the premises and the property insured were destroyed by fire. On January 13th, Miller wrote the company of the loss, and again on January 28th. No answer was made by the company to these letters.

On February 6, 1891, appellee wrote the general agent of the company, notifying him of the loss, and that letter was replied to February 19, 1891, and said their special agent would the next week call on appellee, and added: "Our object in sending him is to ascertain certain facts relative to the claim but not to waive or extend any of the terms of the policy, neither he nor any other special or local agent having any authority to grant such waiver or extension." On February 23rd a special agent of the company visited the place of fire and learned that the building in which the insured property was was occupied as a saloon; and testifies that he did nothing in reference to the loss, except to look over the ruins and ascertain from appellee when and how the fire occurred; and says that he told appellee if he had a claim against the company the policy would direct him what to do. Appellee testifies that the special agent copied the list of property claimed to have been destroyed and the agent stated to him that the company was not liable because the premises were occupied as a saloon. The agent through whom the application was made knew at the time of sending the application how the building was occupied before the policy was issued.

On March 4, 1891, the attorney of appellee wrote the general agent of the company, saying that nothing was done by the special agent, and asking what the company intended to do. To this letter the general agent replied on March 9, 1891, denying liability on the part of the company for the reasons, "First: Occupancy of the building for purposes other than those of a private dwelling, contrary to the warranties in his application and the conditions of

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his policy. Second: Failure on his part to comply with the requirements of the policy as to proofs of loss." On April 1, 1891, suit was commenced on the policy by appellee, and on April 2d, proofs of loss were for the first time made and forwarded to the company and by it received on April 4, 1891. Plaintiff claims a right of recovery because of the fact that the special agent of the company stated to him on February 23d that the company was not liable because the premises were occupied as a saloon.

The policy contains this clause among others: "In case of loss or damage under this policy the insured shall give immediate notice thereof, in writing, to this company. * * * And within thirty days after the loss or damage by fire or lightning, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge of the insured as to the time, origin and circumstances of the loss, the interest of the insured and all others in the property, the cash value of each item thereof and the amount of loss thereon, all incumbrances, if any, thereon, all title to and incumbrances, if any, on the ground on which the property insured is situated, etc.; by whom and for what purpose any building described and the several parts thereof were occupied at the time the loss or damage took place; to which shall be annexed a certificate of the register or notary public living nearest the place of loss, stating that he had examined the circumstances and believes the insured has honestly sustained loss to the amount that such register or notary public shall certify." A verdict and judgment was rendered for plaintiff and defendant brings the record to this court by appeal.

MESSRS. HARBERT & DALEY and T. W. HUTCHINSON, for appellant.

MR. JOHN LYNCH, JR., for appellee.

MR. JUSTICE PHILLIPS. By the terms and stipulations of this policy, the rendering of sworn proofs of loss to the defendant company within thirty days after the insured

property was burned is a condition precedent to the right of plaintiff to recover, unless such proof of loss was waived by the company. That such proofs of loss were furnished within thirty days is not claimed, and nothing in the letters of the general agent can be held to be such waiver; and no letter was written, as appears from this evidence, until after the lapse of more than thirty days after the loss by fire. The special agent who was sent to ascertain the facts relative to the claim, but not to waive or extend any of the terms of the policy, did not visit the scene of the fire until after the lapse of more than forty days. At the time of the first letter from the general agent and at the time of the visit to the scene by the special agent, the plaintiff had failed to comply with a condition precedent, and it can not be held that anything said by the general agent or the special agent was a waiver of plaintiff's obligation to render such sworn proofs of loss as required by the terms of the policy. *Engbretson v. The Hekla Fire Insurance Company*, 58 Wis. 301; *Cedar Rapids Insurance Co. v. Shimp*, 16 Ill. App. 248.

The judgment is reversed and the cause will not be remanded.

Judgment reversed.

47 264
68 501

W. J. TAYLOR AND D. E. VERBLE

V.

JOHN A. TOLMAN CO.

Guaranty—Debt of Another—Acceptance—Agency.

1. When an offer is made to guarantee a debt about to be created, and the party making the offer does not know that it will be accepted so that he may be ultimately liable, no contract exists between the person making the offer and the party to whom the guaranty was made until the offer is accepted and notice given thereof to the guarantor and of the intention to act thereunder.

2. When one guarantees the performance of an act or liability as a

Taylor v. Tolman Co.

present undertaking and for a consideration, the guarantor is in such case liable according to the terms of his contract and without notice.

3. A consideration being recited in the contract in the case presented, the defendants who signed the same can not be heard to say that it was not received, and the recital of the payment thereof was the acceptance of the guaranty, and the general principles applicable to a continuing guaranty do not extend to the bond of an ordinary agent.

[Opinion filed March 3, 1893.]

IN ERROR to the Circuit Court of Johnson County; the Hon. J. P. ROBERTS, Judge, presiding.

In November, 1887, Henry Hood was employed as traveling salesman by the John A. Tolman Co., a body corporate, and was required to indemnify that company against loss by reason of any moneys collected by him or that might be advanced to him, and plaintiff in error entered into the following written contract:

“In consideration of the sum of one dollar to me in hand paid by John A. Tolman Co., the receipt of which is hereby acknowledged, I hereby guarantee the payment to John A. Tolman Co. of any and all money collected by Henry Hood for account of John A. Tolman Co. and for all moneys they may from time to time advance to said Henry Hood in excess of the amount due said Henry Hood as per agreement between said John A. Tolman Co. and said Henry Hood, and to accept a verified statement of the account as kept in the regular books of said John A. Tolman Co. as correct and final between the said company and the said Henry Hood, and without requiring any demand or notice of default. My liability, however, is limited hereby to \$500, together with all costs, attorney's fees and expenses that shall arise from enforcing collections, and for such amount this is intended as a continuing guaranty.

“Witness my hand and seal this 24th day of November, 1887, in the town of Sanburn and State of Illinois.

W. J. TAYLOR.
D. E. VERBLE.”

Suit was brought on this contract by defendant in error, and on trial before the court, without a jury, a finding and judgment was entered for the plaintiff for \$238.43, and defendants sue out this writ of error, and in the assignment of error, and brief and argument, present to this court for decision the question: Is this a continuing guaranty of such character as requires the guarantee to give the guarantors notice of their acceptance. No notice of acceptance was given.

MR. WILLIAM A. SPANN, for plaintiffs in error.

MESSRS. WHITNEL & GILLESPIE, for defendant in error.

MR. JUSTICE PHILLIPS. When an offer is made to guarantee a debt about to be created, and the party making the offer does not know that it will be accepted so that he may be ultimately liable, no contract exists between the person making the offer and the party to whom the guarantee was made until the offer is accepted and notice given thereof to the guarantor and of the intention to act under it. *Newman v. Streator Coal Co.*, 19 Ill. App. 594; *Mussey v. Rayner*, 22 Pick. 223; *Allen v. Pike*, 3 Cush. 238; *Babcock v. Bryant*, 12 Pick. 133; *Norton et al. v. Eastman*, 4 Greenl. 521; *Tuckerman v. French*, 7 Id. 115; *Douglas v. Reynolds*, 7 Pet. 113; *Edmonson v. Drake*, 5 Id. 634; *Adams v. Long*, 12 Id. 207.

And the principle applicable to continuing guaranty is, until acted upon and notice given, the guarantors will not be liable. But when one guarantees the performance of an act or liability as a present undertaking, and for a consideration, the guarantor is in such case liable according to the terms of his contract and without notice, for in such case the liability of the guarantor is primary. *Davis v. Wells, Fargo and Co.*, 14 Otto, 159; *Voltz v. Harris*, 40 Ill. 155. And even though the contract, as here, purports to be a continuing guaranty, the principle applicable to strictly continuing guaranties was held in the case in 14th Otto as not

Drda v. Schmidt.

applicable. Under this contract a consideration is recited and the defendants can not be heard to say that the consideration was not received, and the recital of the payment of that consideration was the acceptance of the guaranty, and the general principles applicable to a continuing guaranty do not extend to the bond of an ordinary agent. *Estate of Michael Rapp v. The Phoenix Insurance Company*, 113 Ill. 390.

The judgment is affirmed.

FRANK DRDA
V.
CHARLES SCHMIDT.

Real Property—Trespass—Way—Landlord and Tenant—Costs—Apportionment of—Polling the Jury—Improper Method of.

1. A tenant can not grant a valid easement over the land of the owner without authority from him.
2. One asserting the act of dedication by a tenant must show his authority to so dedicate; failing in this, no interest passes in the realty as against the owner or any one purchasing under him.
3. The use of a private way, without a claim of right to such use, is not of such adverse character as will form the basis of a prescriptive right.
4. The fact that others passed over the land in question at the *locus in quo* can not affect the question in a given case as to whether the defendant had an easement therein.
5. The question in such case as to the use of the land, and whether an easement had been acquired by dedication, or by prescription are for the jury.
6. The right to poll a jury may be waived; in the absence of a rule justifying the polling of several of the jury upon one day and the balance upon a subsequent day, such action would be improper.
7. In an action of trespass touching certain real estate, defendant claiming a right of way, this court holds that there was no error of which defendant could complain as to the apportionment of costs and declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Madison County; the Hon. A. S. WILDERMAN, Judge, presiding.

Messrs. CYRUS L. COOK and E. BREESE GLASS, for appellant.

Messrs. TRAVOUS & WARNOCK, for appellee.

MR. JUSTICE PHILLIPS. This was an action of trespass brought by plaintiff, the appellee, against the defendant, the appellant, before a justice of the peace, where a judgment was rendered for five dollars, with costs, the defendant failing to appear. The defendant appealed to the Circuit Court, where a trial was had, and a verdict and judgment for one cent was rendered. Motion for a new trial was overruled, and judgment rendered, and motion was made in the Circuit Court to apportion costs, and the court ordered the plaintiff to pay \$50 of the costs and the defendant to pay the balance, which was \$232.05. The defendant brings the record to this court by appeal. The defendant is the owner of a twenty-seven acre tract of land immediately north and adjoining an eight acre tract owned and occupied by appellee, on which last named tract the alleged trespass was committed. The defendant acquired title to the twenty-seven acre tract after the year 1881, and the plaintiff purchased the eight acre tract in 1888; the eight acre tract was leased by the owner thereof on November 14, 1863, to one John Kapp, for the term of twenty years, who continued in possession for the full term, and plaintiff's grantees got title to same during the existence of the said lease. Adjoining the twenty-seven acre tract of land is a tract referred to by the witnesses as the "Suhre tract." The point in dispute, and where the trespass complained of was committed, is a narrow strip on the east side, and a part of, said eight acre tract, extending from the county road on the south to said twenty-seven acre tract on the north.

Before any of these lands were cleared, and up to about 1868, there were numerous trails running from the county road east of said eight acre tract in a northwesterly direction over said eight and twenty-seven acre tracts to the "Suhre tract." These were used occasionally by persons hauling wood from the timber, but chiefly by the occupants of the "Suhre tract." About the year 1868, Rapp, the tenant, cleared up the lands covered by his lease, including the eight acre tract, and fenced the same, leaving a narrow strip near the east line of said eight acre tract, at or including the strip in dispute. His lease did not authorize this, and it does not appear that his lessor knew of or consented to it. Thereafter these persons traveled over this strip until near the twenty-seven acre tract and then traveled in a northwesterly course across the said twenty-seven acre tract to the "Suhre tract," the line of travel being as well defined across said twenty-seven acre tract as it was over this strip. There never was any travel over this "road" by persons other than those above mentioned except for about three or four months in the year 1870, when the Wabash Railroad was being constructed, and then it was used some in hauling material for the construction of said road.

In the year 1884 this "road" had ceased to be used by any one except Henry Smith, the occupant of the "Suhre tract," and appellant, who purchased the twenty-seven acre tract. Appellant then cleared the south end of the twenty-seven acre tract and plowed up that part of the "road" across said twenty-seven acre tract. The occupant of the "Suhre tract" complained to appellant because of his obstructing that part of the road and appellant insisted that there was no road over his land or the eight acre tract, where the trespass is alleged to have been committed, and called upon one who was a tenant in common with plaintiff's grantee to verify his statement, and appellant contracted with plaintiff's grantor for a road on the west side of the eight acre tract, but failing to pay the price agreed upon, leased a road on the west side of the tract. When plaintiff purchased the

eight acre tract he put it all in cultivation, and for more than two years thereafter the defendant did not travel over it or assert any right so to do until the trespass complained of, by driving over it while in cultivation, and in possession of plaintiff. The evidence shows that the road was not recognized or accepted as a public highway by the commissioners, nor any work done thereon. There is no evidence in this record to show an easement in the defendant over the *locus in quo* as a right of way, appurtenant or in gross. The evidence does not show a dedication, as the only act that tends to show dedication is the act of Rapp, the tenant, when he fenced the land, leaving the strip of land over which defendant sought to pass.

It does not appear that his act was authorized by his lease, or that his lessor or the subsequent owners of the land ever acquiesced in any act of dedication, and there is no evidence to show that any owner of the land ever dedicated the easement or recognized its existence. A tenant can not grant a valid easement over the land of the owner without authority from the owner (*Gentleman v. Soule*, 32 Ill. 271); and one asserting the act of dedication, if dependent on the act of the tenant, must show the authority of the tenant for dedication, for the tenant's act could not pass any interest in the realty as against the owner or any one purchasing under him (*Harding v. The Town of Hale*, 83 Ill. 501); and we fail to find in this record any act showing a dedication by the owner. The evidence is clear that there has been no acceptance by the public, through the commissioners of highways, in recognizing this as a public road, and doing any work thereon. Neither do we find evidence in this record to show it a road by prescription, for it not being a public highway, accepted by the public, by its officers, it could not become a private easement so long as it is merely permissive. The use of a private way without a claim of right to such use is not of such adverse character as would form the basis of a prescriptive right. *Dexter v. Tree*, 117 Ill. 532; *The City of Quincy v. Jones*, 76 Ill. 231.

And the fact that the occupant of the "Suhre tract,"

with other persons, at times passed over this land at the *locus in quo* can not affect the question as to whether the defendant had an easement therein. It is said in Washburn on Easements, 4th Edition, 164: "It would seem that it is not necessary that the one who claims the easement should be the only one who can or may enjoy that or a similar right over the same land, but that his right should not depend for its enjoyment upon a similar right in others, and that he may exercise it under some claim existing in his favor independent of all others." And this language is cited and approved by the Supreme Court in the case of McKenzie v. Elliott, 134 Ill. 156.

The action of the defendant in asserting there was no road at this place, and calling on the one in privity with the title of plaintiff to prove that there was no road across the land at this place, and the further fact that he endeavored to buy a right of way over this land, and rented a way along the west side of said tract and used the same for two years, is absolutely inconsistent with the assertion of a right to the *locus in quo*. The questions as to the use of the land by the defendant and others, and whether an easement had been acquired by dedication, or by prescription, were questions of fact for the jury, and from the evidence in this record we find sufficient to sustain the verdict, as the jury found in accordance with the weight of the proof.

The instructions given for the plaintiff, and the defendant's modified instructions, were given on the theory as above stated and there was no error in giving, modifying and refusing instructions. It is insisted there was error in the court in reference to polling the jury. The trial of the case was concluded on Saturday and the jury were instructed by the court to render a sealed verdict, and no objection was made to the jury returning a sealed verdict by counsel for the defendant. After the trial, and while the jury were out, the court adjourned until the following Monday, and the verdict being announced by the court, the defendant's counsel requested the court to poll the jury, and the jury being called, but eleven answered to their names, the twelfth being

absent by reason of sickness, and the court proceeded to poll the eleven jurors, and on the next day the twelfth juror was polled by the court, and to the polling of the jury, eleven at one time and one at another, the defendant objected, and took an exception to the overruling of his objection. It appears from the record that rule No. 31 of the Circuit Court of Madison County is as follows: "That an agreement on the part of counsel to receive a sealed verdict shall be considered and treated as a waiver of the right to poll the jury, and to take any but substantial objections to the verdict, and it shall authorize the court to put the verdict in the proper form, and in all cases where a jury retire without objection to a sealed verdict on the part of either party a sealed verdict may be rendered."

The right to poll the jury is a right that may be waived, and the effect of the rule of court is a waiver by the defendant of the right to poll the jury, no objection being made to their rendering a sealed verdict, and no application being made at the time the jury retired, or suggestion that defendant would desire the jury polled, and hence, under the rule, there was waiver of the poll of the jury. The rule was one that the court had power to make. But for the rule we could not sustain the manner of polling the jury. It is further urged that there was error in the apportioning the costs, as the finding before the justice was \$5 and in the Circuit Court one cent, and in the apportionment of costs the plaintiff was made to pay less than one-fifth of the costs. The defendant wrongfully entered upon the plaintiff's premises and the justice of the case, as appears from the evidence, is wholly with the plaintiff, and is held by our Supreme Court in *Beckman v. Kreamer*, 43 Ill. 447: "Why the plaintiffs should have been required to pay more than a nominal sum in order to a technical compliance with the statute to apportion the costs, we can not very well see. Apportioning them as was done, if an error, it was one of which the plaintiffs in error can not complain."

We find no reversible error in this record.

The judgment must be affirmed.

GEORGE M. FARRIN
V.
MATTHEW COX AND MALINDA COX.

Mortgages—Foreclosure—Fraud in Obtaining Signatures to Notes.

1. The verdict of a jury on a bill to foreclose a mortgage is merely advisory, and not binding on the chancellor.
2. Where, in a given case, the evidence is in the form of depositions, the rule fails that "this court will not disturb the finding of the court below, it having heard the witnesses testify, and observed their demeanor while doing so," questions of fact alone being involved.
3. This court holds that the fact of the assignment of the notes and the amount paid therefor could not enlighten the jury in the case presented in determining whether the defendant had paid the notes under all the evidence in the case, and a certain modification by the court of a given instruction was improper in the suggestion that it might be taken, in connection with other facts, in determining whether the notes had been paid.
4. In view of above, and the evidence, in a proceeding brought to foreclose a mortgage, the defendants claiming that notes involved were obtained by fraud, the judgment for the defendants can not stand.

[Opinion filed March 3, 1893.]

IN ERROR to the Circuit Court of Alexander County; the
Hon. O. A. HARKER, Judge, presiding.

Messrs. LANSDEN & LEEK, for plaintiff in error.

Messrs. GREEN & GILBERT, for defendants in error.

MR. JUSTICE PHILLIPS. Appellant filed a bill to foreclose a mortgage made to secure four notes, due respectively in one, two, three and four years, for the sum of \$89.42 each, made payable to Thomas B. Farrin, who assigned the notes due in two and three years to appellant. Defendants, in their answer first filed, set up as a defense to the bill to foreclose that they had paid all of said notes; subsequently

defendants amended their answer and set up that the mortgage sought to be foreclosed and the assignment were fraudulently made for the purpose of defrauding the defendants. The defendants then filed a further answer and set up that the two notes upon which the suit is founded were obtained by fraud; that defendant Matthew Cox is an unlettered person and can not read manuscript, and relied on the honesty of Thomas B. Farrin; signed all the papers that Thomas B. Farrin said was necessary to be signed in the transaction at the time the notes and mortgage were given, and that he signed four notes, as he is now informed, when at the time he only intended to sign two notes for the sum of \$89.42 each; and that he did not owe more than the amount of the two notes at the time of their execution. The evidence was submitted to a jury, who found for the defendants, and a decree was entered dismissing the bill.

The evidence of said defendant is that he did not sign but two notes, to his knowledge, and he also testified to payments made and having paid the full amount of these notes in addition to the two formerly taken up. His son testifies to substantially the same payments as that testified to by the father. The deposition of A. H. Irwin is that he was circuit clerk of Alexander county, and prepared the mortgage, and that the mortgage and four notes were signed in his presence, and that he explained the contents and effect of the notes and mortgage to the defendant, and at the time T. B. Farrin was not present. The deposition of John H. Robinson shows that T. B. Farrin and Matthew Cox, the defendant, came to his office in 1885, and stated they had a settlement to make between them, and states that he made a memorandum of all the items stated by each party, and that they each agreed upon the items stated; and included in the amount of defendant's indebtedness to Farrin, were two notes of \$89.42 each, and at that time the indebtedness due from defendant to Farrin was \$226.65, and both parties expressed themselves as satisfied with the settlement, and no payment was made after that settlement. The deposition of T. B. Farrin is clear and convincing as to the amount

Farrin v. Cox.

of the indebtedness and as to payments made. The deposition of Horace A. Hannon shows that defendant came to him in February, 1884, and endeavored to negotiate a loan for the purpose of procuring money to pay T. B. Farrin. The deposition of other witnesses show the recognition of the indebtedness on these notes recognized by the defendant in 1884 and 1885.

The complainant was a minor and had a bank account in a savings bank by depositing money earned by him as a clerk and purchased the notes in controversy in this case and they were assigned to him by T. B. Farrin. The verdict of a jury on a bill to foreclose a mortgage is merely advisory and not binding on the chancellor. *Kelly v. Kelly*, 126 Ill. 550. It is held in *Baker v. Rockbrand*, 118 Ill. 365:

“This court has frequently said that when the trial court saw and heard the witnesses, with the opportunity of observing them while testifying, this court would attach much weight to the finding of the trial court, and would not reverse upon mere questions of fact, unless such finding was palpably erroneous, and we are not disposed to depart from that rule. But in cases where, as in the one at bar, the evidence is in the form of depositions, the rule fails. This court having the same facility of determining the truth or falsity of the testimony, must determine from the record the questions of fact as shall appear just and right.” And in this case, while oral evidence was introduced on the trial, yet the greater portion of the testimony was taken in deposition, and we are satisfied that the weight of the evidence does not sustain the verdict of the jury.

Nor does the record show that any issue was made out of chancery to submit a special issue to the jury for finding. The complainant asked the court to instruct the jury as follows: “That the amount which George M. Farrin paid his father, Thomas B. Farrin, for the two notes given in evidence is wholly immaterial,” which the court refused to give, and modified by adding thereto: “And the fact of their assignment should only be considered by you as assisting you, in connection with the other facts and circumstances, in

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determining whether the notes had been paid." The assignment of the notes and the amount paid therefor could not enlighten the jury in determining whether the defendant had paid the notes, under all the evidence in this case, and the modification of the instruction was improper in the suggestion that it might be taken in connection with other facts in determining whether the notes had been paid. For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COM-
PANY

V.

WILLIAM WINKELMANN.

Railroads—Negligence of—Flooding Lands—Trestle Across Natural Watercourse.

1. Testimony of the plaintiff in an action brought to recover for damage arising from the flooding of lands through the negligence of another, setting forth that a certain flood occurred in 1887 or 1888 is admissible under an allegation that it occurred in 1887.

2. In the construction of bridges and trestles crossing natural streams, and the approaches thereto, railroad companies must so construct them that they will not obstruct the natural flow of water.

3. Whether the trestle in a given case constituted an obstruction to the natural flow of the water, by reason of which the flooding occurred, or whether the flowage increased by reason of the manner of construction of the trestle, are questions of fact in a given case for the jury to determine.

4. Where the evidence is conflicting, and that produced by the party in whose favor the verdict is rendered, is, when alone considered, sufficient to support a verdict in his favor, this court will not reverse such judgment as not being sustained by the evidence.

5. This court holds as proper the refusal of the trial court to require the jury to answer certain interrogatories, the fact being that neither of the propositions submitted, on which the jury were asked to find specially, if answered in the affirmative, could control the general verdict.

St. L., A. & T. H. R. R. Co. v. Winkelmann.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

MESSRS. TURNER & HOLDER, for appellant.

MR. WILLIAM WINKELMANN, *pro se*.

MR. JUSTICE PHILLIPS. Appellee, the plaintiff, brought suit against appellant, the defendant, for flooding lands, alleging that the construction of a trestle across a natural watercourse, obstructed the natural flow of water, and alleges damage sustained in 1885, 1887 and 1890 by reason of such overflows. It is first objected that there is a variance between the proof and declaration as to the flood charged in the second count. Plaintiff testifies that the flood occurred in 1887 or 1888, but does not fix the time with certainty. It was not necessary to prove the exact date of the flood and the testimony of the plaintiff as to its occurrence in 1887 or 1888, under the allegation that the flood occurred in 1887, was admissible, and there was no variance, and there was no error in the admission or exclusion of evidence. We have carefully examined the instructions given for plaintiff and we find no error in the giving thereof; nor was it error to refuse the instruction asked by defendant, that railroad companies were only required to have its trestles of sufficient capacity to carry the water that runs in the streams.

In the construction of bridges and trestles crossing natural streams, and the approaches thereto, railroads must so construct them that they will not obstruct the natural flow of water; and a trestle or bridge may be constructed with sufficient capacity to carry the water in the streams and yet, in times of overflow, be an obstruction to the natural flow of water that would flood lands above such trestle. Certain special findings were submitted to the jury which they failed to answer, and on motion to require the jury to

answer the special interrogatories, that motion was denied by the court, to which defendant excepted. Neither of the propositions submitted, on which the jury were asked to find specially, if answered in the affirmative, could control the general verdict. "It is a special finding of facts inconsistent with the general verdict that is to control it, and no question, the answer to which can not have that effect, can be material." C. & N. W. Ry. Co. v. Bouck, 33 Ill. App. 123.

Whether the trestle constituted an obstruction to the natural flow of water, by reason of which plaintiff's lands were flooded, or whether the amount of water overflowing plaintiff's land was increased by reason of the manner of construction of the trestle, were questions of fact that it was the peculiar province of the jury to determine, and it can not be said that there is not evidence on which to base the verdict. Where the evidence is conflicting, and that produced by the party in whose favor the verdict is, when that evidence, if alone considered, is sufficient to support a verdict in his favor, we are not warranted in reversing a judgment as not being sustained by the evidence. It was held in Lewis v. Lewis, 92 Ill. 237, "If the evidence of each side were considered alone, it would require a verdict in favor of the party who introduced it. It therefore follows that the evidence supports the verdict." We find no error in the record. The judgment is affirmed.

Judgment affirmed.

MARY A. SCHMISSEUR

V.

JOSEPH PENN.

Mortgages—Foreclosure—Covenant in Deed as to Incumbrances—Easement—Dedication—Sec. 10, Chap. 30, R. S.—Damages—Set-off.

1. The maintaining of gates at the entrance of a way excludes the presumption of the dedication thereof to the public.

2. In an action brought to foreclose a mortgage given to secure a note given as part consideration for the purchase of the lands in the mortgage described, the defendant contending—the deed conveying said lands being in the statutory form, and to be deemed as a covenant against incumbrances—that there was an incumbrance upon the property in the nature of a private way, this court holds, in view of the evidence, the existence of such way being shown, that the same is not included in the term highway as used in Sec. 10 of the Conveyance Act, and that said incumbrance constituted a breach of the implied covenant in the deed in question.

3. Such defense may be set up in answer to a bill to foreclose a mortgage given to secure the purchase price.

4. Where, in such case, the evidence shows the defendant to have been damaged by reason of the existence of such right of way, the extent thereof should be set off against the amount of the notes sued on.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

Mr. CHARLES P. KNISPEN, for appellant.

Sec. 9, Chap. 30, Starr & C. Ill. Stats., 574, provides that every deed, substantially in the prescribed form, shall be deemed and held a conveyance in fee simple—with covenant against incumbrances—and that such covenant shall be obligatory upon grantor and with the like effect as if written at length in said deed.

The existence of an easement or servitude, of which the land is subject, is a breach of the covenant against incumbrances—right of way, etc. It is no defense that the grantee knew of the existence of the right of way. *Beach v. Miller*, 51 Ill. 206; *Wadhams v. Swan*, 109 Ill. 46; 2 Wait's Act. & Def. 378, 379; 2 Greenleaf Ev., Sec. 242; *New Orleans v. Whitney*, 138 United States, 595; *Huyck v. Andrews*, 10 Am. St. R. 432; 113 N. Y. 81.

By Sec. 10 of the Conveyance Act it is now provided: That no covenant of warranty shall be considered as broken by the existence of a "highway" upon the land conveyed, unless otherwise particularly specified in the deed.

What is meant by "highway"? Under the term "highway" is understood a "public highway" only. 1 Bouv.

Law Dict. 586; 9 Am. & Eng. Enc. of Law, 362; 6 Wait's Act. & Def. 296-300.

Difference between highway and private way discussed in *Huyck v. Andrews*, 10 Am. St. R. 432; S. 113 N. Y. 81. The statute defines highway as any road laid out by authority of the United States or of this State or of any county or town of this State.

A highway can be created by grant, dedication or user. There can be no pretense of a grant in this case. To constitute a public highway by dedication, there must not only be a setting apart and a surrender to the public use of the land by the owner, but also an acceptance and formal opening by the proper authorities; and the intention to dedicate to the public must clearly appear. *Princeton v. Templeton*, 71 Ill. 68; 6 Wait's Act. & Def. 304 (and authorities *infra*).

There can be no pretense of a dedication under the law and the evidence in this case. Nor can it be said that there was such a user of the road as to make it a public highway. To constitute a public highway by user it must have been used and traveled by the public as a highway uninterruptedly for twenty years, and either kept in repair or taken in charge by public authorities. 6 Wait's Act. & Def. 318; *Nealy v. Brown*, 1 Gilm. 12; *C. & A. v. Adler*, 56 Ill. 344; *Ill. C. R. R. v. Benton*, 69 Ill. 174; *Lewis v. N. Y. etc.*, 123 N. Y. S. R. 373—26 N. E. 357; *Gentleman v. Soule*, 32 Ill. 271; *Proctor v. Lewiston*, 25 Ill. 153; *Grube v. Nichols*, 36 Ill. 92; *Toof v. Decatur*, 19 Ill. App. 204; *Martin v. People*, 23 Ill. 395.

Gate or post negatives the idea of a highway. *Washburn Easement*, 186, 187; *Luecken v. Wuest*, 31 Ill. App. 506; *State v. Green*, 41 Iowa, 693.

And where a way is opened as a private way, and intended as such, and this can be shown, no length of use by others will make it a public way. *Washburn, Easements*, 190, 212; 6 Wait's Act. and Def. 296, 300; *Hemingway v. Chicago*, 60 Ill. 324; *Ill. Ins. Co. v. Littlefield*, 67 Ill. 368.

Mr. EDWARD L. THOMAS, for appellee.

The questions raised by this record are settled by the statute and the decree of the Circuit Court in *Needles v. Schmisseur*, September term, 1887.

It seems to be a principle too well settled to require the citation of authorities that the appellant, being a party to the decree in *Needles v. Schmisseur*, is bound in this cause by the findings of that decree, and as it relates to the same subject-matter as that set up as a defense in this case, it would seem to be as to that defense conclusive on appellant, and beyond her power, either to set aside or modify. The language of that decree, after saying that for a portion of the time from 1840 to 1851 the road in question had been used by the public generally as a public road, is as follows: "That said road has been openly, notoriously, continuously and uninterruptedly used by said Clarissa Needles, her ancestors and grantors, for more than thirty years last past." It was open and driven upon by appellant when she bargained for the farm.

Our statute defines a highway as follows: "That, all roads in this State which have been laid out in pursuance of any law of this State or of the Territory of Illinois, or which have been established by dedication or used by the public as a highway for twenty years, and which have not been vacated in pursuance of law, are hereby declared to be public highways." Chap. 121, Sec. 1, 2 Starr & C. Ill. Stats.

The decree finds that its use was open, notorious, continuous and uninterrupted for more than thirty years prior to April 1, 1887. This makes the road a public highway. *Kyle v. Town of Logan*, 87 Ill. 64; *Fox v. Virgin*, 5 Ill. App. 515. There is no pretense that any condemnation was had or any grant made by any one to any person of a private right of way. The user of this road, by everybody, and its uninterrupted user as found in the decree, makes it a public highway. There could have been no private easement of a right of way in this case because a private easement since 1870 can not be acquired in this State except by grant. No private right of way can be had at all since 1870; every way shall be public.

The constitution provides: "The General Assembly may provide for establishing and opening roads and cartways connecting with a public road, for private and public use. Con. of 1870, Article 4, Sec. 30. Prior to the constitution of 1870, no private cartway could be had except by grant (see *Nesbitt v. Trumbo*, 39 Ill. 110), and as will be seen, all now opened, if opened by condemnation, must be for public as well as for private use; in other words, they become public highways as defined by statute.

The statute, Sec. 54, Chap. 121, clearly makes all such roads public ways, and, taken with the decisions of the Supreme Court (*Nesbitt v. Trumbo*, *supra*) and the constitution of 1870, conclusively shows that no private way could, in the nature of things, have existed in the case at bar. It has been decreed in effect to be a road by open, notorious, continuous and uninterrupted user for more than thirty years, a user that necessarily makes it a public highway within the definition of the statute. A private way is not had by dedication. A private way can not, nor could not since 1848, have been had by condemnation. A private way can not be had by user over uninclosed lands (see *Kyle v. Town of Logan*, *supra*, and *Fox v. Virgin*, *supra*), and if inclosed and way left by owner, it is a dedication to the public, not to the owner, of lands to which it leads. The conclusion is inevitable that this is a public highway, such as is taken out of the covenants of warranty. *M. & O. R. R. Co. v. Davis*, 130 Ill. 150.

This statute, 1 Starr & C. Ill. Stats., page 574, Sec. 10, Chap. 30, is to be given a liberal construction and will include a railroad right of way; in other words, any open, notorious user of a way makes it within this statute and takes it without the covenants of warranty. In other words, there can be no recovery since this statute upon covenants of warranty when the breach alleged is the existence of a way which is open and notorious, and more particularly is the appellant estopped from claiming damages in the face of a decree by which she is bound, which recites an open, notorious, continuous and uninterrupted user by a number

of persons for more than thirty years before appellant purchased, and which was so being used when she purchased.

MR. JUSTICE PHILLIPS. Appellee filed a bill to foreclose a mortgage made by appellant to secure a note given as part consideration for the purchase of the lands in the mortgage described. The entire amount secured was paid, except about \$500, with interest thereon. The lands described in the mortgage were purchased by appellant from appellee, and the deed conveying the same was of the statutory form and to be deemed as a covenant against incumbrances, and was made on the 14th of February, 1885. At the September term, 1887, a decree was entered in a certain cause in which one Needles filed a bill against the appellant and others enjoining her from obstructing a certain way described, and further finding that the road had been openly, notoriously, continuously and uninterruptedly used by the said Needles, her ancestors and grantors, for more than thirty years, and enjoining the defendants from interfering with the use and enjoyment of said road by said Needles. To the bill for foreclosure the defendant set up as a defense that the land for which the note secured by the mortgage was executed was part consideration for the purchase of the lands by her from the complainant, and that the complainant covenanted against any incumbrance on said lands, and that there existed thereon at the time of such covenant an easement in one Needles, who at that time had of right a private way across the lands so conveyed, and that the same was a breach of complainant's covenant, by reason of which she sustained damage. The evidence shows that this way had been obstructed by gates and posts for a long period of time, but had been used by Needles and her grantors and by others, and the weight of proof shows it was a private way appurtenant to the lands owned by Mrs. Needles and not a public highway. The evidence also shows that such easement is inconvenient and damaging to the defendant.

A decree for foreclosure was entered and the court made no finding as to whether the road was a public high-

way or a private way, and decreed the foreclosure of the mortgage, and finding the amount due to be \$629.30. The evidence shows that the way was originally opened as a private way and intended as such, and for many years gates were maintained, until the stock law was adopted in that county, and the fact of maintaining gates would exclude the presumption of a dedication to the public. *The Ill. Ins. Co. v. Littlefield*, 67 Ill. 368; *Hemingway v. The City of Chicago*, 60 Ill. 324; *Luecken v. Wuest*, 31 Ill. App. 506. Neither does it appear that it had been used uninterruptedly for a requisite length of time by the public as against the assertion of the owner of his right to fence the same and actually placing gates therein; nor was it either kept in repair or taken charge of by proper officers. That it was not a public highway by prescription, see *Toof v. City of Decatur*, 19 Ill. App. 204; *Grube v. Nichols*, 36 Ill. 92. And there is no claim that it was laid out as a public highway in pursuance of the statute. The evidence, however, clearly establishes the existence of an easement in Mrs. Needles as appurtenant to her farm to pass over the land of the defendant as a right of way, and that easement in her is an incumbrance. *Harlan v. Thomas*, 15 Pick. 66; *Beach v. Miller*, 51 Ill. 206; Sec. 10, Chap. 30, R. S. Ill., provides that "no covenant of warranty shall be considered as broken by the existence of a highway upon the land conveyed unless otherwise particularly specified in the deed." That act was adopted and went into effect July 1, 1874.

At that time the right of eminent domain by condemnation for a cartway or a private way did not exist in any individual under the constitution as it then stood, and such right could not be asserted until the amendment to the constitution, November 5, 1878. The term highway, as used in Sec. 10 of the Conveyance Act, we hold had application at that time to public highways only. Public ways are commonly termed highways; a private way is either an easement or a customary right. Before the adoption of Sec. 10 of the Conveyance Act, knowledge of the existence of a public or private way on the part of the grantee was no

Schmisseur v. Penn.

defense in a suit on the covenants of the deed. *Beach v. Miller, supra*; *Wadham v. Swan*, 109 Ill. 36. In *Beach's* case it was said: "In the case of *Prescott v. Trueman*, 4 Mass. 627, Chief Justice Parsons, in delivering the opinion of the court says: 'Thus the right to an easement of any kind in the land is an incumbrance. So is a mortgage. So, also, is a claim of dower, which may partly defeat the plaintiff's title by taking a freehold in one-third of it.' And to the same effect are the cases of *Mitchell v. Warner*, 5 Conn. 497, and *Harlow v. Thomas*, 18 Pick. 68, where it is held that a private way over the land is an incumbrance. A right to go upon the land to clear an artificial watercourse has been so held in *Prescott v. Williams*, 5 Met. 433, and a right to cut timber on land was held to be an incumbrance. *Catchcart v. Bowman*, 5 Barr. 319."

That the easement in Needles was an incumbrance and her right of way appurtenant is not included in the term highway, as used in Sec. 10 of the Conveyance Act, and that incumbrance existing at the time of the delivery of the deed to the defendant by the complainant the implied covenant existing in that deed by reason of the statute was broken on the delivery of the deed, see *Wadhams v. Swan, supra*; *Christy v. Ogle's Executors*, 33 Ill. 295. And that defense may be set up in answer to a bill to foreclose a mortgage given to secure the purchase price, see *Patterson v. Sweet*, Adm'r, 3 Ill. App. 550; *Coffman v. Scoville*, 86 Ill. 300; *Tenney v. Hemenway*, 53 Ill. 97. The evidence showing the defendant was damaged by reason of the existence of the right of way, the extent of the damage should have been set off against the amount of the notes, and that not being done the decree must be reversed and the cause remanded.

Reversed and remanded.

LOUIS SALTENBERGER ET AL.

V.

CONRAD LANG.

Trespass by Stock—Growing Crops.

In the case presented, this court declines to interfere with the judgment for the plaintiff, the questions involved being entirely of fact, the action having been brought to recover for damages done growing crops by cattle.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

MESSRS. SNYDER & SNYDER, for appellant.

MESSRS. TURNER & HOLDER, for appellee.

MR. JUSTICE PHILLIPS. Appellee brought suit before a justice of the peace against appellant to recover damages for injury to appellee's corn, caused by appellant's stock. Before a jury, a verdict and judgment was rendered for \$5. The defendant prosecuted an appeal to the Circuit Court, where a trial was had by the court, a jury being waived, and a judgment for plaintiff for \$5 was entered. No propositions of law were submitted on either side, and no question of law raised in argument, and questions of fact alone are involved. The judge of the Circuit Court saw and heard the witnesses, and while there is conflict in the testimony he could better determine what motive actuated the witnesses, and their interest, than can be done from the record. *Geelan v. Reid*, 22 Ill. App. 165; *The Consolidated Ice Machine Company v. Keefer*, 26 Ill. App. 466; *Aholtz v. The People*, 121 Ill. 560.

The judgment is affirmed.

Judgment affirmed.

THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY

V.

HENRY BRINKMAN.

Railroads—Right of Way—Condemnation of—Injury to Lands Not Taken—Evidence—Profile.

1. In proceedings involving the condemnation of private property for railroad purposes, the profile of the proposed road is an important element in determining the damages, and is, when in evidence, the controlling evidence as to the plan of construction of the road, and if this be changed so as to inflict greater injury on the land owner, he can recover for the increased damages.

2. If a road is constructed in accordance with the profile offered in evidence on condemnation proceedings, and no change is made in the plans and profile so offered, no recovery can be had in an action on the case by reason of a mistake of the jury in determining the amount of damage, or by reason of a failure to allow a sufficient sum as damage to contiguous lands, or a compensation for lands taken, nor by a wrong description of the profile, where it is open alike to be described by witnesses offered by the railroad company, or by the land owner; and all damages consequent on the construction of the road, in accordance with the implied agreement made by the company that it would be constructed according to the profile, when it is so constructed, are, by the condemnation proceedings, *res adjudicata*.

3. Damages arising from the piling up of earth excavated from road bed and ditches is an element that may ordinarily be taken into consideration by the jury in determining the damages in condemnation proceedings.

4. Where a profile was in evidence and the road was constructed in accordance with it, the verdict of the jury can not be disturbed, although an engineer of the company had stated falsely to the jury when viewing the premises, or upon the stand, that the grade of the road would be different from what it turned out to be.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Madison County; the Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. MORRISON & WHITLOCK and W. P. BRADSHAW, for appellant.

MESSRS. TRAVOUS & WARNOCK, for appellee.

MR. JUSTICE PHILLIPS. The appellant instituted proceedings for condemnation of right of way over certain lands owned by appellee in Madison County before a circuit judge and jury of that county and circuit. In that proceeding appellee filed a cross-petition for injury to lands not taken. The jury returned a verdict finding compensation for the land actually taken for right of way at \$962.50, and further found the damage sustained by appellee to contiguous lands not taken and described in the cross-petition to be \$1,037.50. The petition filed by appellant described the land to be taken and, on the hearing, a profile of the road as it crossed the land of appellee was offered in evidence to the jury, and was considered by them both on the hearing and on their inspection of the premises as a jury. By permission of the court the owner of the premises and an engineer of the company were permitted to accompany the jury and describe the profile and the route of the road and to show how the lands belonging to appellee were used. A judgment was rendered on the verdict of the jury and \$2,000, the aggregate amount of the verdict, was paid by appellant to appellee, and appellant constructed the road across said lands on the line of the survey as made before condemnation. The condemnation proceedings were had about July 1, 1890.

After the construction of the road by appellant, appellee brought suit in the Circuit Court of Madison County in an action on the case on about March 3, 1891. Appellee, in his declaration so filed, set forth the fact of proceedings being instituted for condemnation and set forth the further fact that damage to lands not taken and contiguous to the right of way were assessed and paid, and then avers: "And the plaintiff avers that in said proceeding and trial the defendant represented that its railroad upon said right of way would be constructed along and over said public highway where the same separates said improvements, as aforesaid, and adjacent thereto, on a level with the natural surface of said highway and without cut or fill in said highway, and that

the plaintiff's use of said highway there in connection with said improvements and premises would not be interfered with or obstructed by any cut or fill in said highway. And the plaintiff avers that said damages, assessed as aforesaid, were assessed and determined under the supposition and belief that said railroad would be constructed over and along said highway in accordance with the representation aforesaid and upon the basis that there would be no cut or fill in said property to damage or interfere with the use and enjoyment of said premises and improvements."

But the plaintiff avers that "the defendant, in violation and disregard of said representation and understanding aforesaid as to the manner in which said railroad was to be constructed along and across said highway, afterward proceeded to construct the same along and across said highway at a depth of four feet and over, and of a width of twenty-eight feet or thereabout, and piling up the earth excavated along the side of said cut in large quantities, by means whereof the plaintiff has been greatly injured, and in effect deprived of all the use of said highway in connection with said premises and improvements, and all communication between the said improvements upon one side of said highway and those on the other, and the danger and inconvenience in the use of said premises and improvements to have been greatly enhanced, none of which were anticipated or considered in the assessment of the damages aforesaid in said condemnation proceeding." A demurrer to this declaration was filed and overruled by the court. To this declaration appellant pleaded not guilty, and on trial a verdict and judgment was rendered for appellee in the sum of \$800, and from that judgment the appellant brings the record to this court by appeal.

The whole theory on which appellee's right of recovery was based was that Sublette, an assistant engineer of the company, while going over the right of way with the jury for the purpose of examination, stated that when the ties and rails were laid the railroad would be substantially on a level with the public highway, and on the witness stand

stated "that there would be a slight cut of eight, ten or twelve inches, but the height of the ties and rails would substantially make it on a grade with the road; that is, after the railroad had been made it would be on a level with the public highway." The evidence shows that the road as constructed is a cut of four feet or over, between appellant's house and barn. On the trial of the condemnation proceedings a profile was offered in evidence, and as shown by the testimony, was explained to the jury, and the evidence further discloses the fact that the railroad was constructed in strict accordance with the profile and plans in evidence and on the line of survey. The profile and plan for the construction of the road was proper and material evidence of the utmost importance to enable the jury to come to a correct conclusion. It was held in the *J. & S. R. R. Co. v. Kidder*, 21 Ill. 131, as follows:

"Indeed it seems to us that the plan upon which the road was to be built and the mode of construction were of the utmost importance to enable the jury to come to a correct conclusion, and that it was not only the right but it was the duty of the railroad company to furnish full plans, profiles and estimates of that part of the road, and if they failed or neglected to do so, then the jury were authorized to presume that the road would be constructed in the mode the most injurious within the bounds of reasonable probability."

It was further held in *P. & R. I. Ry. Co. v. Birkett*, 62 Ill. 332: "The company must construct the road as indicated by its maps and plans introduced upon the trial. If these should be changed the land owner could recover any damages resulting from the change." To the same effect is *St. L., J. & C. R. R. Co. v. Mitchell*, 47 Ill. 165.

It is further held in *L. S. & M. S. Ry. Co. v. C. & W. I. R. R. Co.*, 97 Ill. 506, that "where the petition failed to state the mode of use proposed, the railroad company ought, on the trial, to show by its plans and profiles the manner of use proposed as a basis for fixing a just compensation in such case." From the rule thus established by the Supreme Court it would follow that the profile of the road is an important

element in determining the damage, and is, where in evidence, the controlling evidence as to the plan of construction of the road, and if this be changed so as to inflict greater injury on the land owner he could recover for the increased damages. *St. L., J. & C. R. R. Co. v. Mitchell, supra*; *I. & S. R. R. Co. v. Kidder, supra*.

It is held in the latter case: "We do not hesitate to say that the company would be bound to construct the road substantially according to the plans thus put in evidence, and if its own or the public interests required a deviation from such plan, to the injury of the owner of the land, he could recover those damages in an action on the case or the implied undertaking that the road should be constructed conformably to such plans." Therefore we hold if a road is constructed in accordance with the profile offered in evidence on condemnation proceedings, and no change is made in the plans and profiles so offered, then no recovery can be had in an action on the case by reason of a mistake of the jury in determining the amount of damage, or by reason of a failure to allow a sufficient sum as damage to contiguous lands or a compensation for lands taken, nor by reason of a wrong description of the profile where it is open alike to be described by witnesses offered by the railroad company or by the land owner; and all damages consequent on the construction of the road in accordance with the implied agreement made by the company that it would be constructed according to the profile, when it is so constructed, are by the condemnation proceedings *res judicata*.

It is further urged that additional damage resulted to appellee by reason of piling up the earth excavated from the road bed and ditches and on the right of way. It is very clear that to construct the railroad according to the profile the excavated earth must be thrown out from the road bed and the ditches alongside thereof, and that such excavated earth, where not conveniently and necessarily used in constructing embankments, must necessarily be thrown out alongside of the road bed, and such is the result, and uniform, if not universal practice in such works, and where such result

may be contemplated or followed in the construction of a railroad, and so piling the same alongside the road would injure the land owner, it is an element that may be taken into consideration by the jury in determining the damages in condemnation proceedings.

It was held in *Doyle v. Baughman*, 24 Ill. App. 614: "Whatever was proper for the jury to take into account as a part of the damages consequent upon the construction of the proposed work it must be presumed was considered by them on such assessment, and such an item can not be the subject of another claim for damages. The matter is *res judicata*." Freeman on Judgments, 272. In the instructions given by the court for the plaintiff, and in the modification of the defendant's instructions, the court proceeded on the theory that if Sublette testified falsely as to the profile, or made a false statement to any of the jurors when on the ground, that notwithstanding the profile was in evidence, such false testimony or false statement would not render the verdict of the jury as to the damages conclusive, even though the road was constructed in strict accordance with the profile. In this there was error. The evidence does not sustain the verdict.

The judgment is reversed and the cause remanded.

Reversed and remanded.

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THE CHICAGO & ALTON RAILROAD COMPANY

V.

ALEXANDER G. LOGUE, ADMINISTRATOR.

Railroads—Negligence—Personal Injury—Death of Child—Signals—Crossing—Law of Inheritance—Sec. 2, Chap. 70, Starr & C. Ill. Stats.

1. In a personal injury case it is error to admit in evidence the testimony of persons who placed an inanimate object upon a railroad track, as to the distance at which it could be seen and its character distinguished, the circumstances and surroundings being entirely different from those that existed at the time of a given accident.

C. & A. R. R. Co. v. Logue.

2. An instruction setting forth that an omission to ring the bell or sound the whistle in a given case was negligence, should not be given unless it appears that such omission was in some measure the cause of the injury.

3. An infant brother or sister of an infant killed through the alleged negligence of a railroad company, born a short time after the accident, is an heir.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Madison County; the Hon. B. R. BURROUGHS, Judge, presiding.

This is an action on the case brought by the father as administrator of his deceased child, who was run over and killed by a train on appellant's road when he was about twenty-one months old. Plaintiff was stationed at Edwardsville crossing, a station on that road, and occupies as a residence a part of the depot building, which is situated between the tracks of the appellant and the C., C., C. & St. L. R. R. On each side of the building was a platform extending to the respective roads. Just north of these platforms was a public road. Appellee with his family had lived there for three years, his family consisting of his wife, a child about three years old, at the time sick with the scarlet fever, and the child that was killed. The train from Chicago to St. Louis had been running on the same time for years and if on time passed the station about 6:40 P. M., generally running at the rate of forty-five miles per hour, and did not stop at Edwardsville station unless signaled to do so by the dropping of the green ball as a signal to receive orders. Appellee was a telegraph operator at that place and on the day the child was killed was relieved by the night operator about 6:30 P. M., and knew about the time the train would be along. He went from the depot to a stable about fifty feet from the platform to get ready a horse and buggy to drive out to deliver a message some distance from the station, and while so doing, the mother engaged with the sick child—the boy aged twenty-one months left the house unobserved by its mother and sat down on the railroad track

about eight or ten feet from the highway crossing, with his back to the train, which came along about on its usual time and running at its usual speed.

There is conflict in the evidence as to whether signals were given by the ringing of the bell and the sounding of the whistle as the train approached the highway crossing. The mother missed the child, ran to the platform and saw the approaching train and the child sitting on the track, called the husband and ran up the platform toward the child waiving her hands. The engineer and fireman saw her and about the same time saw something on the track, but could not distinguish what it was; as soon as they could tell it was a child the engineer did all that was possible to stop the train, but it was impossible to do so, and the train struck the mother, slightly injuring her, and ran over and killed the child. Among other instructions given at the instance of the plaintiff the court gave the following: "The court instructs the jury that even if the parents of the child were guilty of slight negligence in permitting said child to escape and get upon the tracks at the time it was killed, still if the jury further believe from the evidence that the engineer and fireman in charge of the defendant's train were guilty of gross negligence in the management of their train or in failure to ring a bell or sound the whistle as required by law; if the jury believe from the evidence that they did so fail to ring the bell or sound the whistle, and that the negligence of said parents was slight and that of the engineer and fireman was gross in comparison with each other, then the jury should find for the plaintiff."

The amended declaration of plaintiff charges the engineer neglected the statutory duty to ring a bell or sound a whistle; and avers that the deceased left surviving him, as his heirs, his mother, Mrs. Alexander G. Logue, a brother, A. Russel Logue, and the plaintiff, his father. The evidence shows that about two months after his death his mother gave birth to another child, which was living at the commencement of the suit and the trial thereof, and which is not mentioned in the declaration. The court allowed evi-

C. & A. R. R. Co. v. Logue.

dence to go to the jury of a coal bucket containing coal having been placed upon the track by witnesses who walked up the track and then were permitted to testify as to the distance they could distinguish what it was and what it contained. A verdict and judgment for plaintiff was rendered in the sum of \$2,500, and the plaintiff brings the record to this court by appeal, and numerous errors are assigned.

Messrs. WISE & DAVIS, for appellant.

Messrs. TRAVOIS & WARNOCK, for appellee.

MR. JUSTICE PHILLIPS. On material facts in this case the evidence is conflicting and the case a close one on the facts. It was held in C., B. & Q. R. R. Co. v. Dvorak, 7 Ill. App. 555: "Where, as in this case, the evidence is closely conflicting as to necessary elements of the plaintiff's cause of action, we hold it to be a rule founded in the plainest principle of justice and essential to its fair administration that such party shall not be suffered to gain an undue advantage over the opposite party by means of defective and misleading instructions to the jury. Of such a character is the one given for the plaintiff * * * The question of fact essential to the cause of action, that the plaintiff received his personal injuries in consequence of the neglect of the engineer to ring the bell or sound the whistle * * * is wholly excluded from the consideration of the jury. Unless the injury was the result of such neglect or breach of duty there could be no recovery, and that authority is sustained by Galena R. R. v. Dill, 22 Ill. 264; I. & St. L. R. R. Co. v. Blackman, 63 Ill. 117; T., W. & W. Ry. Co. v. Jones, 76 Ill. 311."

It was error to give the sixth instruction above for plaintiff.

The child born after the death of deceased occupies such relation to him that he inherits the estate of deceased the same as if living at the time of his death. Sec. 2, Chap. 70, Starr & C. Ill. Stats, provides: "Every such action shall be brought by and in the name of the personal representatives

of such deceased persons, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property."

It should have been alleged in the declaration that he was next of kin and there was a variance as to the allegation as to the next of kin left by deceased.

There was also error in the admission of evidence as to placing an object on the track and proof as to the distance it could be seen and distinguished where the circumstances and surroundings were wholly different from those attendant on the engineer in the discharge of his duties. *Yates v. People*, 32 N. Y., p. 511.

We express no opinion as to a right of recovery on the facts. For the errors indicated, the judgment must be reversed and the cause remanded.

Reversed and remanded.

JAMES K. P. CARTER

v.

JOHN V. WINGARD.

Real Property—Crops—License to Remove—Landlord and Tenant.

1. A parol reservation of a crop can not stand in view of the conveyance by warranty deed of the land in question, the same containing no reference to such reservation.

2. A license by parol may be given to remove a crop from land owned by the licensor, and the severing thereof from the soil before the revocation of the license by the licensor estops the latter from so revoking.

3. While one tenant in common may bring trover to recover the value of his interest in a crop converted by his co-tenant, when such action is brought it is a recognition of the relation that exists between them.

4. The action in the case presented being brought to recover a cer-

Carter v. Wingard.

tain share of a given crop, the plaintiff, by asserting a tenancy, recognized the existence of the relation between himself and the defendant, and the latter having delivered the share to which the former was entitled, the judgment against the former can not be disturbed.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Jefferson County; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

The parties to this action were owners in equal undivided shares, and tenants in common of the lands mentioned in the evidence. By agreement between them, Wingard planted, tended and harvested the crops, retaining two-thirds thereof for his labor, seed, etc., and the other third was divided equally between them. Each paid one-half of the taxes on the land and one-half the interest on the mortgage indebtedness which incumbered the land when they bought it. In the summer of 1890, Wingard offered to sell out to Carter for a return of his money invested, leaving Carter to pay the incumbrance and taxes. The offer was not then accepted, and he sowed part of the land in wheat, under the agreement above mentioned. After the wheat was sowed, Carter claims he accepted the proposition, and, in pursuance thereof, paid off the mortgage on the 18th day of November without Wingard's knowledge. The trade was consummated and the final agreement made, after several conversations relating thereto, about the last of March, 1891, and two weeks later, viz., on April 16, 1891, Wingard conveyed his interest in the land by general warranty deed to Carter and received his money therefor.

At the time of the delivery of the deed, while the parties were at the notary's desk, a conversation occurred in which Wingard testified that he said, "There is a wheat crop growing on a part of this land and I want to know and understand if the wheat crop is to be divided as it has been heretofore;" to which Carter replied, "Oh, yes, we understand all that." The notary testified in substance the same, except that he used the word rent. On his first examina-

tion, Carter testified that nothing was said at that time about the division of the crop. But after the others had testified he was recalled and said: "Wingard remarked, 'I reserve my undivided interest in the wheat crop,' and I said 'Of course that is all right.'" At threshing time, Carter claimed one-third of the wheat and Wingard only allowed him to take one-sixth, the difference being forty-six bushels. Carter then brought this action. It was tried by the court without a jury and resulted in a finding and judgment for the defendant for costs, from which the plaintiff appealed.

Messrs. J. M. DURHAM and G. B. LEONARD, for appellant

Mr. ALBERT WATSON, for appellee.

MR. JUSTICE PHILLIPS. If the deed was the only point to be considered it would have to be held that it conveyed all the interest that Wingard had in the wheat crop and a parol reservation of a crop growing on the land would not be valid and binding.

Before the execution of the deed the relation of landlord and tenant existed as to one-half interest in the crop. The conveyance of the undivided one-half interest in the land did not change the relation that existed between Wingard and Carter as to one-half interest owned by Carter which he had leased to Wingard. It is clear that before the conveyance, the amount of rent to be paid to Carter for his one-half interest was one-sixth of the crop as his rent, and while a parol reservation would not be valid, a license by parol may be given to remove a crop from the land owned by the licensor, and the conversation between plaintiff and defendant may be considered as a license to the defendant to remove the crop, and he acting on that license and severing the crop before the revocation of the license by the plaintiff, which he may have done at his pleasure, the right of revocation ceased when the crop was severed from the soil. It is held in *Powell v. Rich*, 41 Ill. 466:

"It is true that the owner may license a party by parol

Callicott v. Rowan & Son.

to enter and remove growing crops, and if acted upon and they are reduced to possession and removed, the title will vest in the party acting under the license." And the evidence shows the severance of the crop before a revocation of the license. Again, while one tenant in common may bring trover to recover the value of his interest in a crop converted by his co-tenant, when such action is brought in trover it is a recognition of the relation that exists between them.

This action is brought to recover the value of one-sixth of the crop, plaintiff claiming one-third thereof. By asserting a claim for rent, he recognized the existence of the relation between himself and defendant of landlord and tenant, and recognizing that relation, the only remaining question is as to the amount of rent to be paid. If the relation of landlord and tenant existed as to one-half interest in the crop, it grew out of a conversation between the plaintiff and defendant at the time of the execution and delivery of the deed, and that conversation did not in any manner seek to change the amount of rent from that which had been theretofore paid, and the amount previously paid was one-sixth of the crop. The defendant, therefore, having delivered the portion of the crop to which plaintiff was entitled, the plaintiff had no right of recovery against him and it was not error in the court to so find. The judgment is affirmed.

Judgment affirmed.

F. E. CALLICOTT
V.
L. ROWAN & SON.

Contracts—Sale of Wheat Crop—Appeal and Error.

This court will not, in the absence of evidence of passion or prejudice, interfere with the verdict of a jury in a given case, the evidence being conflicting and no question of law being involved.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Gallatin County; the Hon. S. Z. LANDIS, Judge, presiding.

Messrs. O. M. KINSALL and PILLOW & MILLSPAUGH, for appellant.

Messrs. ROEDEL & REID, for appellees.

MR. JUSTICE PHILLIPS. Appellant, the plaintiff, brought suit against appellees, the defendants, on an alleged contract by which he claims the defendants purchased of him his wheat crop of 1889. Defendants operated a mill for the manufacture of flour, and contracted with the plaintiff to purchase of him some wheat of a fine quality at a price a few cents higher than the market price.

Defendants desired to establish a reputation for their mills, and purchased this wheat, to be manufactured into flour to be sold to special customers, and the contention between the parties is as to whether defendants were to take the entire crop of 1889 of the plaintiff or only sound wheat of a good quality. A trial was had before a jury and a judgment and verdict found for defendants, but the plaintiff prosecutes this appeal. The controversy is purely one of fact, and no complaint is made of the admission of evidence or of instructions to the jury. The evidence is conflicting and it is the peculiar province of the jury where there is such conflict to weigh, consider and reconcile the testimony, and from the entire evidence ascertain the truth, and so find, and when they have done this we will not interfere with the finding unless it is manifest that they have mistaken the evidence or have been governed by passion or prejudice. *Chapman v. Burt*, 77 Ill. 337; *Addems v. Suver*, 89 Ill. 482; *Connecticut Mutual L. Ins. Co. v. Ellis, Admr.*, 89 Ill. 516; *C., B. & Q. R. R. Co. v. Lee*, 87 Ill. 454.

This much may be fairly said, that there is quite as much evidence to sustain the contention of the defendants as there was for the plaintiff, and we see no cause to disturb the verdict, and the judgment is affirmed.

Judgment affirmed.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY

v.

JOHN W. McHENRY.

Railroads—Negligence—Defective Brake—Special Findings.

1. Where no objection is made to evidence offered on trial, nor variance argued in the motion for new trial or assignment of error, the declaration must be held to be sufficient after verdict.

2. It can not be considered to be contributory negligence for a passenger on a railway train to take hold of the brake wheel on a car, as he comes upon the platform thereof.

3. If such brake is dangerous to persons leaving or entering a given car, recovery may be had for injuries suffered through the use thereof.

4. Only special findings inconsistent with the general verdict are of consequence.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of White County; the
Hon. C. S. CONGER, Judge, presiding.

Messrs. W. H. DYE and HOLDERBY & BLAKELY, for appellant.

Messrs. ORGAN & ORGAN, for appellee.

MR. JUSTICE PHILLIPS. Appellee became a passenger on appellant's train. The station at which he desired to get off having been called, he arose and went to the platform of the car and placed his left hand on the brake wheel, at the time holding a lantern in his right hand, when the brake wheel suddenly revolved, breaking appellee's arm. The declaration avers the duty of appellant as, "and thereupon it became the duty of the defendant, upon the arrival of said train, at, etc., aforesaid, to give the plaintiff time and opportunity safely to alight therefrom, and then and there to stop said train a reasonable time so as to enable the plaintiff to alight

therefrom," and avers the breach of duty; "yet the defendant did not regard its duty, or use due care in the management of said train or the different parts of machinery composing said train, but, on the contrary thereof, upon the arrival of said train, at, etc., aforesaid, and while the plaintiff, with due care and diligence, was about to alight therefrom, when some part of said machinery constituting said train suddenly gave way, to wit, the wheel constituting a part of the brake and guard by which said train is controlled, that some part of the machinery connected with said brake gave way, thereby injuring the plaintiff," etc. The breach of duty alleged is much broader than the duty stated. No objection to evidence offered was made on trial, nor was variance argued in the motion for new trial or assignment of errors. The declaration, therefore, must be held sufficient after verdict. Air brakes were used on the train, and there were also attached to the cars the chain brake, rod and wheel, to be used in the event the air brakes failed to work. It appears from the evidence that if the chain is wound around the brake rod and the ratchet wheel is not held by the dog, on application of the air brakes the wheel will revolve rapidly, and in no other way can it be thus made to revolve by the air brakes. The proof is that not until the car stopped did the plaintiff take hold of the brake; the car was still when he left the car. There is no conflict in the evidence as to the injury, and it resulting from taking hold of the wheel of the brake. It can not be considered that it was contributory negligence for the plaintiff to take hold of the brake wheel as he came onto the platform of the car; it stands the prominent object, most convenient to seize hold of on leaving the car on the side where it stands, and even though the passenger knows its purpose, it is not contributory negligence to take hold of it. If it be attendant with danger to take hold of it, then surely it should be placed differently or be securely protected. That it is dangerous at a certain time this evidence shows; and if the touch of the foot of a person coming aboard or leaving the car, however accidental, if the turning of the wheel by an intermeddling person ever

so slightly, removes the hold of the dog in the ratchet wheel and then causes this brake wheel to become a dangerous piece of machinery, thus indeed is a person boarding or leaving the car in danger without notice, a danger of a character that a passenger should be protected from by the carriers, and its so easily becoming an object of danger, its becoming such object, is a condition not consonant with the safety of the passenger, because not properly fastened, and hence the brake's wheel and its machinery was defective, and being so, it authorized the general verdict.

But it is insisted that as the jury, in answer to special interrogations, found, first, that there was a safe and convenient platform from which to alight; second, that the plaintiff did not go upon the platform until the train came to a full stop; third, that the accident was not caused simply by grasping the brake wheel; fourth, but the sudden revolving of the wheel at the same time the hand was placed upon it; fifth, the jury were unable to determine if there was any defect in the brake or its machinery; sixth, that it was inspected as thoroughly as time and circumstances would permit; and by these findings it is urged, it appears, the jury found the defendant was entirely free from negligence. The only special finding that could have controlled the general verdict, which was for plaintiff, and his damages assessed at \$500, was the fifth, if answered in the affirmative. But the answer to that question was that the jury was unable to determine whether there was any defect in the brake or its machinery. - The evidence shows that when switching, the air brakes were not connected, and hence the hand brake necessarily used; it then could not become a dangerous piece of machinery, and for such purpose there was no defect or unprotection in the brake or its machinery, nor is it liable to suddenly revolve. But when the train is made up and the air brakes connected, as a piece of machinery that may so easily become an object of danger, it should be securely fastened, that accidental causes or careless and irresponsible persons intermeddling may not endanger the limbs of passengers. And the inability of a jury to answer clearly

and fully a question of that character does not control a general verdict. It was possible for the defendant to so have fastened the wheel that such an accident as this could not have happened, and this without unreasonable expense or trouble. That such an accident could have been reasonably expected and foreseen is shown by the actual knowledge of the inspectors, who knew of the liability of the wheel to revolve when unfastened. And omission to provide against this accident is actionable negligence. Motion was made to dismiss appeal for alleged want of abstract, which motion was reserved for final opinion. We find the abstract sufficient, and the motion to dismiss appeal is overruled.

We find no error in giving or refusing instructions, and the judgment is affirmed.

Judgment affirmed.

J. J. SYLVESTER ET AL.

V.

AUGUSTA A. HALL ET AL.

Real Property—Lease of Right to Dig Coal in.

In a controversy arising out of a contract providing for the mining of coal under certain real estate, a general demurrer having been sustained to each count of the declaration, this court holds, upon consideration thereof, that the first and third counts are good and that as to them the demurrer should have been overruled, but as to the rest, that it should have been allowed to stand.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Perry County; the Hon. B. R. BURROUGHS, Judge, presiding.

On the 7th day of May, A. D. 1888, plaintiffs and defendants entered into a certain contract under seal, on which

Sylvester v. Hall.

the plaintiffs brought suit and filed their declaration, containing five counts. The first count avers the execution of the instrument under seal, and sets out the contract *in haec verba*, and avers thereby defendants leased to plaintiffs the right to mine and remove coal underlying certain lands described, excepting certain parts of said lands, and further avers that by the terms of the contract the defendants covenanted that they were lawfully seized of said real estate, with power to lease for coal mining purposes, and warranted the peaceable possession to the plaintiffs, and aver the breach that the plaintiffs could not peaceably enter upon said real estate and mine the coal thereunder, and that the Jupiter Mining Company, a corporation organized under the laws of the State of Illinois, evicted and dispossessed the plaintiffs from said real estate and were lawful owners thereof.

The second count avers the leasing of certain lands for the purpose of mining coal thereunder, and that prior thereto the coal had been removed therefrom, whereby the said land was a loss to the plaintiffs for the purpose for which it was leased. The third count avers that by the terms of the contract the defendants did covenant and agree to sell the plaintiffs at any time within one year from the date of the contract certain lands therein described, and would convey the same by good and sufficient warranty deed for the consideration of \$20,000, with six per cent interest from date, and that it was further stipulated and covenanted that should such purchase be made by the plaintiffs, then all royalty paid by the Frizzell Coal Mining Company should be credited on the amount of the purchase price and considered a part of the purchase money paid by plaintiffs to the defendants; and avers the purchase by plaintiffs in accordance with the contract and the making of the deed, and further avers that the Frizzell Coal Mining Company paid the defendants royalty after the date of the contract and before the purchase by plaintiffs the sum of \$2,000, and the defendants did not credit the same, and that the plaintiffs paid the defendants the sum of \$2,000 by reason of the de-

fendants failing to credit said amount, whereby the defendants failed to keep their covenant.

The fourth count avers the covenant and agreement to sell and convey certain premises described, reserving all rights of the Frizzell Coal Mining Company to mine coal under ten acres of the land, and describing the ten acres which had theretofore been leased to the said Frizzell Coal Mining Company, and avers that by the terms of the lease to the Frizzell Coal Mining Company it was to mine the coal under said ten acres in a lawful manner, according to the rules and regulations governing such mining operations, in such way as to least injure the surface, but avers the Frizzell Coal Mining Company did not do so, and that the plaintiffs purchased said premises from the defendants and by reason of the Frizzell Coal Mining Company failing to work its mine in a proper manner the defendants have not kept their covenant. The fifth count is similar to the fourth, with the addition of averring certain representations made by the plaintiff at the time of executing such lease. A general demurrer was interposed to the declaration, and each and every count thereof was sustained, and plaintiff abiding by their declaration, a judgment was rendered for the defendants for costs, and the plaintiffs appeal and assign for error the sustaining the defendants' demurrer and in rendering judgment against the plaintiffs for costs.

Mr. R. W. S. WHEATLEY, for appellants.

Mr. T. T. FOUNTAIN and BENJAMIN W. POPE, for appellees.

MR. JUSTICE PHILLIPS. The demurrer was general, and the first and third counts are good in substance, and as to them the demurrer should have been overruled. The second count does not aver that any covenant was made, that the coal had not been mined from said land, and hence it stated no covenant as existing, the breach of which is alleged. The fourth count avers no covenant on the part of plaintiffs as to the manner in which the mining was to be done and per-

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formed by the Frizzel Coal Mining Company, and hence, under the averments of that count, it does not appear that any liability could exist against plaintiffs for the manner in which that company mined the coal. The fifth count is like the fourth, with the further averment that representations were made without averring any covenant on the part of the plaintiff. It was not error to sustain the demurrer to the second, fourth and fifth counts of the declaration. For the error in sustaining the demurrer to the first and third counts, the judgment is reversed and cause remanded.

Reversed and remanded.

ILLINOIS CENTRAL RAILROAD COMPANY

V.

MAY AXLEY.

Railroad—Negligence — Personal Injuries — Passenger — Evidence — Instructions.

1. While a railroad company is not required to carry passengers on its freight trains, it may do so; and when it is in the habit of carrying passengers on a train starting at a particular time, it impliedly invites passengers thereon, and where a caboose is left on a side track shortly before a given freight train is to leave, and is left open at a point where passengers have been in the habit of boarding it, the company impliedly invites passengers to enter the same.

2. If such company accepts passengers on a freight train it is held to the same degree of care as on a passenger train, except that the passenger must assume the usual ordinary risks arising from and incident to that method of travel, and when a passenger on such train is injured by reason of the negligence of the company, and at the time he is using due care and caution, he may recover.

3. The injury in question having occurred while the train in question was being made up, and before the conductor had proceeded to collect fares, this court holds that there is nothing in the contention that the plaintiff was guilty of fraud in failing to disclose her age, no questions having been asked touching the same.

4. The refusal of an instruction is not error where the question involved therein is contained in one given for the same party.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Alexander County; the Hon. O. H. HARKER, Judge, presiding.

MESSRS. GREEN & GILBERT, for appellant.

MESSRS. MULKEY & SONS, for appellee.

MR. JUSTICE PHILLIPS. On or about the 20th of March, A. D. 1890, the appellee, a minor, entered a caboose car on appellant's road to be carried as a passenger from Cairo to Ullen. At the time of so entering the car it was not attached to the train, and in making up the train, the engine, with other cars, backed against the caboose car with so much momentum that the caboose car was driven back and the jar threw appellee to the floor, by which she was seriously injured. The evidence shows that the appellant was in the habit of carrying passengers in the caboose of this train, and passengers had been in the habit of entering the car before the train was made up; and on this occasion several persons had entered this caboose to be carried as passengers, including appellee, and were subsequently carried to their destination on that car. While a railroad company is not required to carry passengers on its freight trains, it may do so. If it does so, it is its own election so to do, and where it is in the habit of carrying on a train starting on a particular time, it impliedly invites passengers thereon, and when the caboose is on the side track shortly before the train is to leave, and left open at a point where passengers have been in the habit of boarding it, the company impliedly invites passengers to enter. The rule is if a railroad company accepts passengers upon its freight trains, it is held to the same degree of care as on passenger trains, except that the passenger must assume the usual ordinary risks arising from and incident to that method of travel. And when a passenger on such train is injured by reason of the negligence of the company, and at the time he is using due care and cau-

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tion, then he may recover. C. & A. R. R. Co. v. Flagg, 43 Ill. 364; I. C. R. R. Co. v. Nelson, 59 Ill. 112.

The evidence in this record clearly shows that the train was driven against the caboose with unusual, unnecessary force. While the engineer in making up the trains had been in the habit of kicking cars back on this track, which was down grade, yet the testimony further shows it to be the duty of the helper to check up the cars by using the brakes. On this occasion the cars were sent back with such force that it attracted the attention of the conductor or some person who spoke to the engine fireman, and said: "You are rapping the caboose up pretty lively." The evidence further shows that if the helper had let the cars down gradually they would hardly have felt the jolt. The track was wet and at the time it was raining. No one was on the cars that were kicked back which caused the jar. Had the helper been at his post to check the cars and done his duty the injury would not have resulted. The evidence fully sustains the charge of negligence from the fact that no one was endeavoring to check the speed of the cars to render the jar less. It is urged by the defense that appellee paid no fare and was of an age that fare should have been paid; that her appearance was such she would be thought to be under age, and hence it was a fraud on the railroad company for her not to disclose her age and recognize her duty to pay fare. No question was asked appellee or in her presence in this behalf. There was no concealment or misrepresentation by her, nothing done by her to procure her transportation free. It does not appear she was asked to pay fare, nor does it appear that her mother was asked to pay for her. It is true none was collected from or because of her.

However that may be, she was injured before the train started on its way. At the time of her injury the conductor had not entered the car to collect fare from any one. She entered the car as a passenger and from all the circumstances surrounding had a right to consider herself invited so to do. She had the rights of a passenger and the fact that no fare was sought to be collected or any tendered by her can not change her status. The thirteenth, fifteenth and eighteenth

instructions asked by the defendant and refused by the court, and the refusal of which is assigned as error, were based on the theory that if fare was not tendered unasked by any one no recovery could be had. These instructions were properly refused. It is also urged that appellee was guilty of contributory negligence which would preclude a recovery. It appears from the evidence in this record that after entering the car the appellee was standing by her mother, who was preparing a bed for her to lie on, she being tired, and was making a bed of their wraps, and while doing so the plaintiff was standing up when the collision came. There is conflict in the testimony as to whether the plaintiff was cautioned to sit down and as to the time she was standing up, but under the facts in the record we can not disturb the verdict of the jury on this question. The refusal of the sixteenth instruction asked by defendant is assigned as error. That instruction embraces the proposition of contributory negligence. Its refusal was not error, as the seventh instruction given for the defendant included the same question.

We find no error in the record. The judgment is affirmed.

Judgment affirmed.

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153s 244

THE ROBINSON BANK
v.
FRANK O. MILLER ET AL.

THOMAS V. LAMPORT
v.
FRANK O. MILLER ET AL.

SINGLETON B. ALLEN
v.
FRANK O. MILLER, ET AL.

Mortgages—Foreclosure—Parties—Practice.

1. A person being a party to the record in a given case, as a member of a firm named, and not dismissed therefrom, he is still a party to the

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record, although, pending litigation, he dissolves connection with such firm, and the attorneys who appeared for the firm continue to be his attorneys of record, and it is proper to require him to make answer to cross-bills, in such case.

2. When such person has been appointed a receiver pending litigation, he may be required to account for rents received, and keep the property insured therefrom.

3. In a controversy based upon a bill filed for the cancellation of certain mortgages, the case being here the second time upon the original bill, the cross-bills of certain mortgagees and petition for the appointment of a receiver pending the litigation, this court declines, in view of the evidence, to interfere with the decree of the trial court refusing to cancel certain mortgages, but providing for their foreclosure, the dismissal of a certain cross-bill, and appointment of a person named as receiver of the mortgaged property.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Crawford County; the
HON. WILLIAM C. JONES, Judge, presiding.

Mr. E. CALLAHAN, for The Robinson Bank and Singleton
B. Allen.

MESSRS. PARKER & CROWLEY for Thomas V. Lamport,
Wiley S. Emmons, William W. Walter, Willis Emmons et al.

MR. JUSTICE PHILLIPS. An original bill was filed by the Robinson Bank to cancel certain mortgages, one made by Miller and wife to Lamport, one by John S. Emmons and wife to Willis Emmons, and another by John S. Emmons and wife to Wiley S. Emmons, and William W. Walter, John T. Noye and other judgment creditors of these mortgagors, intervened and asked to be made parties, and a decree was entered granting the prayer of the original bill. From that decree an appeal was prosecuted to this court, and an opinion filed, and the case reported as Miller v. The Robinson Bank, 34 Ill. App. 460. On the cause being remanded to the Circuit Court there was an amendment of the original bill and a cross-bill, filed by Wiley S. Emmons and William W. Walter and certain parties brought in by further amend-

ment and service by reason of the death of some of the original parties. Without repeating the statement of facts as made in *Miller v. The Robinson Bank, supra*, we adopt that statement at this time. On the case being remanded a decree was entered foreclosing the mortgages on the cross-bill of Willis Emmons, and the cross-bill of Wiley S. Emmons and William W. Walter, and dismissing the cross-bill of Lamport, and canceling the same in accordance with the prayer in the original bill.

It further appears that during the pendency of this litigation the bank sold and conveyed the mill property to Singleton B. Allen, who entered into possession of the same and operated said mill. On motion of the complainants in the cross-bill the court appointed Allen as receiver, and from the decree entered on the original and cross-bills after it being remanded from this court, three separate appeals are presented—one by the Robinson Bank, which is from the decree entered in foreclosing the cross-bill on the mortgages made by John S. Emmons, one by John V. Lamport from the decree dismissing his cross-bill and canceling his mortgage, and one by Singleton B. Allen from the decree as to him, which finds that the conveyance to him by the bank of the mill property was subsequent to the mortgages made by John S. Emmons to Willis Emmons, Wiley S. Emmons and John W. Walter, and that the said property, as conveyed by the bank to Allen, was subject to the lien of said mortgages, and that Allen should retain possession and the mortgagees should have a lien on the rents if the proceeds of the mortgaged premises are insufficient to pay the same. The first, second, third, fourth, ninth and tenth assignments of error are assigned on the findings of the court in decreeing the foreclosure of the mortgage made by John S. Emmons and denying the prayer of the original bill to cancel such mortgages. The evidence discloses the fact that what was termed the mill property, which was owned by John S. Emmons and Newton before Miller became a member of the firm, was about four acres of land, as described in the mortgages made by Emmons, and as described in the deed

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made by Emmons and wife to the Robinson Bank, Emmons owning one-third and Newton owning the other two-thirds interest in that tract, and when Miller purchased an interest in the mill the land described in the deed made by Newton and Miller to the bank is the same tract, excepting about three-quarters of an acre in the northeast corner of the land.

The interest of each of the respective partners was purchased and the conveyances were made to them respectively as tenants in common; as between themselves they each held their interests as tenants in common, and no part of the property was purchased with partnership funds. In the conveyance to Miller made by Newton, and in the purchase of the interest at the foreclosure sale by Emmons, they each treated the property as property held by them as tenants in common, and in dealing with the bank it treated the property the same way and called on them individually for their respective parts of the \$5,400 owing the bank at the time the note for \$1,800 was executed with Emmons and Walter as sureties thereon, and when the bank took the conveyance of the mill property from Newton and Miller, that conveyance was of "all the interest of the grantors in," etc., and in the conveyance to the bank of the mill property by Emmons, they took the conveyance as the "one-third undivided interest." The bank treated the property as being held by them as tenants in common, and these deeds were drawn by a member of the firm that constituted the Robinson Bank, and at the time the bank, through its attorney, who was a partner in the bank, only credited Newton, Emmons and Miller with the estimated value of the interest of Newton, recognizing the mortgages as being an incumbrance, and taking a confession of judgment for the residue of their indebtedness. But aside from this, the testimony shows that before the execution of the deed by Emmons to the bank, Woodworth, to whom the deed was made, as trustee for the bank, knew of the existence of the notes and mortgages made by Emmons. John S. Emmons testifies that Woodworth said they would have to pay these

mortgages, and would pay them, but would fight the Lamport mortgage. Wiley S. Emmons testifies that Woodworth said to him before the deed was made by John S. that "he understood that I had a mortgage; I told him that I had; he said that it was a valid mortgage and that it would be paid; * * * he requested me to go and advise John to sell; he wanted title to the mill and wanted my influence to get it. He wanted me to influence John to make his deed to them for his interest in the mill. He said that the mortgage was valid and would be paid. He wanted me to go, and I did go, and influence John to make a deed."

William W. Walter testifies that after the deed was made Woodworth said to him that the mortgage to Emmons and himself would be paid. And George W. Fletcher testifies that Woodworth said to Walter after the deed was made that he would pay those mortgages off, that they were all right except the one by Miller. Although Woodworth denies these statements, yet the weight of proof is not with him. That the execution of the deed to the bank by Emmons subsequent to this promise of Woodworth makes the equity of these plaintiffs much greater. The testimony of Willis Emmons shows that at the time he signed the note as security for John S. to Wilkin, John S. said that if he wanted a mortgage he would give it upon his interest in the mill, and subsequently John S. wanted him to take one-half his interest in the mill, but he would not do it, and John S. Emmons testifies that he told his sureties on the \$1,800 note; that if he had a deed he would mortgage to them, and when he got a deed would give them a mortgage. And the execution of these mortgages and placing the same on record before any other lien attached would give a prior lien to these mortgages. It was not error to enter the decree of foreclosure on the cross-bills filed to foreclose the mortgages made by John S. Emmons and in refusing to cancel these mortgages.

The sixth, seventh, eighth and eleventh assignments of error are because of the decree in ruling Singleton B. Allen to answer the cross-bills and in requiring him to account

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for rents pending the litigation and that he should keep the mortgaged premises insured. Singleton B. Allen was a member of the firm constituting the Robinson Bank and one of the complainants in the original bill. After the decree was originally entered in the Circuit Court, and before the prosecution of any writ of error to this court, he dissolved connection with and ceased to be a partner in the Robinson Bank. No steps were ever taken to amend the bill by dismissing it as to him, and so far as their record shows he is still a complainant in the original bill. When the cause was remanded from this court, a notice that a motion would be made on the first day of the September term, 1890, of the Circuit Court of Crawford County, to reinstate said cause, and the service of that notice, was acknowledged by the attorney for the bank, and it is insisted that as Allen had dissolved connection with that firm, the court had no jurisdiction over him. He being a party to the record as a member of the firm, and not dismissed therefrom, he was still a party to the record, and the attorneys who filed the original bill were still his attorneys of record, and it was not error to require him to answer the cross-bills. He became a purchaser pending the litigation, and on the application of the complainants in the cross-bills, the court appointed him as receiver of the mortgaged premises, and as such receiver to account for the rents and profits pending the litigation, and to keep the mortgaged premises insured. He being the receiver, it was clearly within the power of the court to require him to account for the rents, as it is shown that the mortgaged premises are a scant security for the amount decreed to the complainants on the foreclosure of the mortgages made by John S. Emmons; and inasmuch as the value of the premises was dependent on the preservation of the mill, and without it the security would have been wholly insufficient, it was clearly within the power of the court to require the receiver, from the rents, to keep the property insured.

The fifth assignment of error is that the court erred in decreeing a foreclosure of the mortgage described in the cross-bill against the mortgaged premises in its present con-

dition, disregarding the improvements made by the Robinson Bank and by Singleton B. Allen. It appears from the evidence that during the pendency of the litigation the Robinson Bank made improvements on the property, and after that bank, through its trustees, conveyed its interest to Allen, Allen also made improvements; but these improvements were all made while the litigation was pending, and the court could not, by its decree, sever machinery placed in the mill or repairs made by either the Robinson Bank or by Allen, but must sell the interests conveyed by the mortgages as the one-third interest in the property; and if any rights exist in the bank or Allen by reason of any improvements made, on the coming in of reports of sale their rights could be protected. It was not error to decree the sale of the premises as made on the cross-bills. Without repeating what we said when this case was before us heretofore, we adhere to what we then said, and this disposes of the errors assigned by Singleton B. Allen and the Robinson Bank. The errors assigned by Thomas V. Lamport are in the granting of the prayer of the original bill and in dismissing his cross-bill. From the entire evidence in the record we are not satisfied of the good faith of that mortgage, and Lamport's refusal to answer questions as to the source from which he derived the money, together with other evidence as to the derivation of some of the money, is such that we will not disturb the finding of the court on that question.

The decree is affirmed.

JENNIE F. SEXTON ET AL.

V.

BARTHOLOMEW CARLEY.

Ejectment—Leasehold Interest—Cahokia Commons.

1. The owner of land, or one holding it under a lease, may plat the same for purposes of subdivision and subletting, or sale of the interest of one so holding the same, and when done by a lessee, such platting can

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in no manner affect the title or create a dedication of any part thereof to the public, and where so platted by the lessee for purposes of description, one taking a lease under such lessee may acquire any title that he could convey, and the description by plat is a sufficient description.

2. An outstanding title to defeat a clear, connected title in another, must be superior thereto, giving the holder of the former the right of immediate entry.

3. In an action of ejectment brought to recover possession of a leasehold interest in certain lots, the same being a portion of what are known as Cahokia Commons, this court holds, in view of the evidence, that a lease involved could not be considered forfeited, no demand for rent having been made, and that the judgment for the plaintiff must be affirmed.

[Opinion filed March 3, 1893.]

IN ERROR to the Circuit Court of St. Clair County; the
Hon. B. R. BURROUGHS, Judge, presiding.

Mr. F. G. COCKRELL, for plaintiff in error.

Mr. M. MILLARD, for defendant in error.

MR. JUSTICE PHILLIPS. This is an action of ejectment brought to recover possession of a leasehold interest in lots number two and three, being a subdivision of lot two of United States surveys number 777.

Both parties claim title from the village of Cahokia. The land in question is a part of the grant made to the village of Cahokia by the French Government and afterward confirmed by the United States, and usually designated as Cahokia Commons. By virtue of an act of the legislature of this State, the platting of the lands by the supervisor of the village was authorized for the purpose of leasing the same for any period not exceeding one hundred years; and on the 27th of June, 1844, the lands in controversy, with other land, were leased to Shannon, Letcher and Baldwin for the term of ninety-five years. The lessees subdivided the lot leased by them from the supervisor, and underlet the lots as so subdivided, and it is first objected that the division and platting of the land by the lessees was unauthorized.

The owner of land, or one holding it under a lease, may plat the land for purposes of subdivision and subletting, or

sale of the interest of one so holding the same, and when done by a lessee, such platting could in no manner affect the title, or create a dedication of any part thereof to the public, and where so platted by the lessee for purposes of description, one taking a lease under such lessee may acquire any title that he could convey, and the description by plat is a sufficient description.

The evidence shows that the defendant in error, through the following chain of title, obtained title by the conveyance on April 8, 1846, by the lessees conveying the lots in question to one Cubberly, and he conveyed, on the 14th of November, 1846, to one Benstead, and he, on March 11, 1850, conveyed to Donohue. It then appears that a decree of sale was had on a proceeding by the administrator of Patrick Donohue to sell land to pay debts. The petition recites that Patrick Donohue left no widow and no children, and that his next of kin and only heir at law known to the petitioner was Catherine Donohue, a sister of the deceased, who, together with all persons concerned, petitioner made defendants, and notice given to all persons concerned by publication of the application and report of sale made, and a deed, on the 20th of June, 1855, made by the administrator of Patrick Donohue, conveyed the land to William Gallagher, and on the 9th of February, 1864, by virtue of certain partition proceedings had of the lands owned by William Gallagher, he having died, a special commissioner, by virtue of that decree, conveyed the lots in question to one John Gallagher. It is objected that that deed is not valid because of the fact that the petition avers that William Gallagher died leaving as his heirs at law his brothers, John, James and Richard Gallagher, who were the sole heirs of the said William Gallagher, unless they were half brothers and half sisters, who, if living, were unknown to the petitioner, and publication was made as to the unknown heirs of William Gallagher. But the decree does not show that any guardian *ad litem* was appointed.

The court in its decree finding the interest of the parties and entering a decree for sale on the coming in of the report of the commissioners, and ordering a sale, which was made,

that sale would pass the title of the premises as to all but minor heirs, and it does not appear that there were any heirs other than those found, and that decree of sale can not be impeached in a collateral proceeding, the court having jurisdiction of the subject-matter and the parties, and that the conveyance vested the purchaser with William Gallagher's title; and on December 14, 1875, John Gallagher and wife conveyed to the plaintiff. Plaintiff also showed possession in himself and those in privity with his title with claim of title from 1859 to March 3, 1884, when his tenant, one Starkel, attorned to the plaintiff in error. It further appears that Starkel leased the lands from the plaintiff in error after attornment and she recovered possession from him in an action of forcible detainer. The defendant, to defeat plaintiff's title, sought to show outstanding titles. An outstanding title, to defeat a clear connected title in plaintiff, must be a title superior to his, giving the party owning it the right of immediate entry. One of the outstanding titles relied upon is a leasehold estate granted by the supervisor of Cahokia to one John Simon, and if he was in possession at any time there was an entry on that possession by the supervisor of the village, and the entry, so far as the record shows, was peaceable and acquiesced in, and from 1846 to the present time plaintiff has been in possession, or possession had by those in privity with his estate; and the other was a conveyance in 1850 by Patrick Donohue to Martin, as trustee for Dorethe Donohue. And neither she nor her trustee are ever shown to have been in possession, and the peaceable possession of defendant in error and those through whom he derives title have been acquiesced in for more than forty years. There was no outstanding title to defeat plaintiff's claim.

It was attempted on the part of the plaintiff in error to show that the supervisor of Cahokia had declared a forfeiture of the lease, and of the parties in possession of the original lot number two, under the lease to Shannon, Letcher and Baldwin, and notice was served by the supervisor. So far as appellee was concerned he continued in possession until his tenant attorned to the plaintiff in error, and this lease

was made before the act of 1865. Before a forfeiture could be declared a demand of rent upon the premises must be made. *Chadwick v. Parker*, 44 Ill. 326; *Chapman v. Kirby*, 49 Ill. 211. It was held in *Dodge v. Wright*, 48 Ill. 382: "The question whether the lease had been forfeited, thereby rendering the complainant liable to an action of forcible entry and detainer, has also been settled in this court in the case of *Chadwick v. Parker*, 44 Ill. 326. It was there held that the act of 1865, upon which the plaintiffs in error rely, does not dispense with the common law requirement of a demand of rent upon the premises before declaring a forfeiture of the lease." No demand for such payment has been made in this case, but by reason of the non-payment of rent the supervisor gave notice that he had declared a forfeiture of the lease. No forfeiture resulted, but after this attempted declaration of forfeiture the supervisor leased the lands to the plaintiff in error and then executed a deed selling and conveying the same to her, and plaintiff in error then induced Starkel, the tenant of defendant in error, to attorn to her, and she acquired no right to hold possession of the premises thereby and did not acquire a lawful possession. *Gage v. Hampton*, 127 Ill. 87. Her rights under her lease and deed are subordinate to the estate of defendant in error, and the judgment is affirmed.

Judgment affirmed.

47	320
58	635

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAIL-
WAY COMPANY

V.

W. C. ROPER.

Railroads—Negligence—Killing Stock—Unfenced Switch Yard.

A railroad company is not bound to fence its tracks at points within the switch limits of stations where freight is received and discharged. No recovery can be had for the death of the cow in the case presented, it having occurred at such place.

C., C., C. & St. L. Ry. Co. v. Roper.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of Saline County; the Hon. A. K. VICKERS, Judge, presiding.

Mr. WILLIAM H. DYE, for appellant.

Mr. A. W. LEWIS, for appellee.

MR. JUSTICE PHILLIPS. This is an action for killing a cow owned by appellee, at the station of "Carrier's Mills," on appellant's road, and within the switch limits at that station. The point where the cow went on the track, and where injured by the train, was at a point where the switch yard was kept open for the convenience of the public for receiving and discharging freight, and necessary to the public to be kept open for that purpose. While there is no positive proof as to the exact place where the cow got upon the track, yet the evidence showing where she was found after being knocked off sufficiently shows that she went on the track near the grain house. The evidence also shows that the company and the public used the track at this point for receiving and discharging freight, and at such points within the switch limits of the station there is no duty on the railroad company to fence the track. To require such place to be fenced would cause delay and inconvenience to the public and detract from the public character of a railroad. C., B. & Q. R. R. Co. v. Hans, 111 Ill. 114. No actual negligence is charged or proven, but the case was tried upon the theory that it was the duty of the railway company to fence its track at these points. There being no duty to fence the road, under this evidence no recovery can be had. The question as presented by this record has been frequently passed on by this court. L. E. & St. L. R. R. Co. v. Scott, 34 Ill. App. 635; C., C., C. & St. L. Ry. Co. v. Abney, 43 Ill. App. 92, and C., C., C. & St. L. Ry. Co. v. Myers, 43 Ill. App. 251.

The judgment must be reversed and cause will not be remanded.

Judgment reversed.

47 322
61 361

THE MISSOURI PACIFIC RAILWAY COMPANY ET AL.

V.

ALEXANDER FLANNIGAN ET AL.

Exemptions—Law of Missouri—Garnishment—Injunctions—Damages—Actions.

1. Courts of equity will not inquire into the motives which actuate one in proceeding in a legal manner to collect a lawful claim.

2. A non-resident creditor may proceed by attachment against a non-resident debtor and garnishee a foreign corporation doing business in this State, and a court of equity is without jurisdiction to enjoin the collection of such a claim.

3. Although a party to a suit should have filed his suggestion of damages at the same term at which an injunction was dissolved as to him, the other party, by appearing and litigating the assessment of damages without objection, waives error if any exists through failure to do so.

[Opinion filed March 3, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

This is a bill filed by appellant, a corporation established under the laws of the State of Missouri, and certain others, who were employes of that corporation in and about the operation of that railroad in the State of Missouri, and averring that certain of said employes are heads of families and residents of the State of Missouri, and that wages are earned by them and payable in said State of Missouri, where said employes reside; that the amount so earned by said employes is in nearly all cases for each month's service, in excess of \$50, and that under the laws of the State of Missouri the wages due such employes for the last thirty days' service are exempt from garnishment under the laws of the said State of Missouri; that the said railroad company has certain agents in the State of Illinois, and that it thus becomes subject to the laws of Illinois, and that certain employes of

said railroad company have borrowed money from persons in the State of Missouri at usurious interest, and that such creditors of such employes proceed before a justice of the peace in the State of Illinois by attachment, and summon said railway company as garnishee of such employes for wages due from it; and further avers that the employes thereby are deprived of the exemption laws of the State of Missouri; and avers that the defendant Flannigan has been acquiring claims against said employes and instituting proceedings thereon in his name, and proceeding by attachment against said employes, and garnishing said railway company; that said Flannigan has repeatedly instituted proceedings in attachment against said employes of said company and summoned said company as garnishee before James H. Wyatt, a justice of the peace of St. Clair County, Illinois; and avers that proceedings against certain employes are now pending, and if permitted to be prosecuted to final judgment the said railway company are in danger of being compelled to pay the wages due said employes the second time; and avers that the action of said Flannigan is fraudulent, and that the exemption laws of the State of Missouri can not be set up in defense, and prays for an injunction against Flannigan and Wyatt to enjoin them from instituting such suits and entering judgment on such claims. A temporary injunction was granted in accordance with the prayer.

The defendants filed an answer to the bill, which was afterward withdrawn, and a motion to dissolve the injunction was entered on the ground that there was no equity in the bill and that there was a complete remedy at law. At the May term, 1891, of the Circuit Court of St. Clair County, the demurrer was argued, and the temporary injunction granted as to the defendant Wyatt was dissolved, and a decree entered that he should recover costs of suit, and the court, as to the defendant Flannigan, took the motion under advisement, and treating the motion as a demurrer to the bill, sustained the motion and demurrer at the September term, 1891, and dismissed the bill with costs; and previous thereto each of the defendants, during said September term,

1891, filed suggestion of damage, and on evidence in open court, the court found that each of the defendants Flannigan and Wyatt had sustained damages in the sum of \$75 each, and that such damages were the usual and proper attorney's fees for legal services in procuring the dissolution of the injunction. Complainants bring the record to this court by appeal and assign as errors the sustaining of the demurrer to the bill of complaint and in permitting defendants to file suggestion of damage and in allowing each of said defendants \$75 for attorney fees in procuring the dissolution of the injunction.

Messrs. C. N. TRAVOUS and H. S. PRIEST, for the Missouri Pacific Ry. Co., and R. W. GOODE for R. R. Brooks et al., employes, appellants.

Mr. M. MILLARD, for appellees.

MR. JUSTICE PHILLIPS. In the case of *The Wabash Railroad Company v. Dougan*, 41 Ill. App. 543, it was held that a non-resident creditor might proceed by attachment against a non-resident debtor and garnishee a foreign corporation doing business in this State; and in that case the answer the garnishee set up was that the plaintiff fraudulently and with the express and avowed purpose of evading the exemption laws of Missouri, and of depriving the debtor of the exemption of that State, came to this State and sought to avail himself of the process of our courts; and in the case cited it was held that "admitting the legal right of the plaintiff to come to this State and avail himself of such remedies as our laws afford, the motive by which he was actuated in so doing is immaterial. A party pursuing his legal rights in a legal manner, can not be called in question in respect to the motives which prompt him to action." A non-resident creditor having a right to resort to the courts of this State and proceed by garnishment against a foreign corporation doing business in this State, Flannigan would have the right to acquire the claim and proceed in the collection

• Vieths v. Skinner.

thereof, and a court of equity is without jurisdiction to enjoin the collection of such a claim; nor will a court of equity more than a court of law inquire into the motives which actuate one in proceeding in a legal manner to collect a lawful claim.

It was not error to sustain the demurrer, dissolve the injunction and dismiss the bill. The suggestion of damage by the defendant, Flannigan, was filed before the court sustained the demurrer to the bill as to him. From this record it does not appear that any objection was made to the filing the suggestion of damage by Wyatt, and no motion was made to strike his suggestion of damage from the files, and in the suggestion of damage on the part of Flannigan and Wyatt each, the complainant appeared and litigated the assessment of damage in both cases, without objection; and even if it should be held that Wyatt should have filed his suggestion of damage at the same term at which the injunction was dissolved as to him, still the complainants, by appearing and litigating assessment of damage, without objection, waived error if there was any. *Gerard v. Gateau*, 15 Ill. App. 520.

The evidence as to the damage sustained on each assessment supports the finding of the court as to the amount of damage. We find no error in this record and the decree is affirmed.

Affirmed.

CLAUS VIETHS
V.
GEORGE J. B. SKINNER.

47	325
97	417

Personal Injuries—Street Contractors—Negligence of—Evidence.

1. A street contractor having knowledge that persons passed along a street which he was engaged upon, and that the same was in a dangerous condition, is bound to erect guards at dangerous places, or display cautionary signals to give notice of the danger.

2. A stranger seeing people traveling upon a street in the night time, has a right to assume that the same is reasonably safe, and to go upon the same, but must use ordinary care.

3. The question whether a person was using ordinary care to avoid injury in passing along a street at the time and place of receiving a given injury is a question of fact to be determined by the jury.

4. It is proper in an action against persons under contract with a city to repair and improve one of its streets, to recover for a personal injury alleged to have occurred through their negligence, service of process having been had only on one of the defendants, to admit the contract in evidence, in order to show the control exercised by the contractors over the street in question, and their connection with the performance of the work being done, and such evidence is proper in a proceeding against the defendant served only.

5. In an action on the case to recover for a personal injury resulting from the negligence of several persons, the plaintiff may sue all or some of the parties jointly, or one of them separately, and when the declaration charges two or more, and one only is served with process, each being jointly and severally liable, it is not error to proceed to a judgment against one only, nor would the rule be different in actions *ex delicto*, if all the defendants had been served and judgment taken as to one only.

[Opinion filed March 3, 1893.]

APPEAL from the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Mr. F. G. COCKRELL, for appellant.

Messrs. MILLS & FLITCRAFT and MESSICK & RHOADS, for appellee.

MR. JUSTICE PHILLIPS. Appellant, and one George W. Allen, were contractors in the business of grading, paving and improving streets, and entered into a contract with the city of East St. Louis for the improvement of Collinsville avenue, in said city. They began their work, and erected along the sides of said street stone walls ten or twelve feet high and filled between the same with earth, stone and brick to about the level of said walls. In the performance of their work it became necessary, and they tore up the sidewalk along said street. On each side of said street the

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stores were open and persons living on the street and others were in the habit of passing along the same. The plaintiff in passing along and upon said street slipped and stumbled upon some stones piled thereon and fell from the level of the street as made by the contractors to the natural level of the ground, about the distance of twelve feet, and received serious injury therefrom. No railing or guard was erected along said street, nor were any lights or signals placed as cautionary signals. And in the night time the plaintiff was so passing along said street and was a stranger in the city, and had not passed along the street where the injury occurred, but had seen it at a distance and had noticed that persons were traveling thereon. The contractor having knowledge of the fact that persons traveled along the street, and as shown by the evidence of the defendant he had that knowledge, owed the duty of having guards to prevent persons from falling over such dangerous places or cautionary signals to give notice of the danger. It can not be held that the plaintiff was guilty of contributory negligence in passing along said street, he being a stranger in the city and never having been over that portion of the avenue where he was injured prior to that time, but from a distance had seen people traveling it, and there being no danger signals or barriers to inform him of its dangerous condition, and it being dark, and he seeing persons traveling along the street, had a right to presume it was reasonably safe. Having no knowledge of its dangerous condition, he will be held to no more than ordinary care. *The City of Aurora v. Hillman*, 90 Ill. 61; *City of Bloomington v. Chamberlain*, 104 Ill. 268.

The question of whether he was using ordinary care to avoid injury in passing along the street at the time and place of receiving the injury, is a question of fact to be determined by the jury, and it can not be determined as a matter of law that he was guilty of negligence in going along said street without notice of its condition. *The City of Sandwich v. Dolan*, 133 Ill. 177.

The declaration was against George W. Allen and Claus

Vieths, but service of process was had only on Vieths, and it is urged that the court erred in admitting in evidence the contract between the city of East St. Louis and the contractors. We think this evidence was proper to show the control exercised by the contractors over the street and their connection with the performance of the work being done, and this evidence was proper in proceeding against Vieths only. The defendant insists that inasmuch as the declaration charged Allen and Vieths with negligence, and the contract in evidence is signed by Allen and Vieths, that there was a variance between the proofs and declaration; and it is urged that the court erred in refusing an instruction asked by the defendant to find for the defendant. In an action on the case to recover for a personal injury resulting from the negligence of several persons, the plaintiff may sue all or some of the parties jointly, or one of them separately. *Fisher v. Cook*, 23 Ill. App. 621; *Fisher v. Cook*, 125 Ill. 280.

And when the declaration charges two or more, and one only is served with process, each being jointly and severally liable, it is not error to proceed to a judgment against one only; nor would the rule be different in actions *ex delicto* if both parties had been served, and judgment taken as to only one. It was said in *Davis et al. v. Taylor*, 41 Ill. 405: "It was held in *Dow v. Rattle*, 12 Ill. 372, which was an action of assumpsit, to be error to render final judgment against part of the defendants without disposing of the case as to the others. On the authority of this case, the same thing was said in an action of replevin in the case of *Barbour v. White*, 37 Ill. 164. There were, however, other grounds for reversing the last named case, and on further considering this point we are of opinion that the rule should not be applied to actions of tort. There is no reason for thus applying it, because there is no contribution among wrong-doers. Taking a judgment against a portion of the defendants amounts to a dismissal of the case as to the residue, and in actions *ex delicto*, this may be done. If the mode of doing it is irregular it is an irregularity which works no prejudice to those defendants against whom the

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judgment is taken. They should not therefore be permitted to assign it for error." We have carefully considered the questions raised on the instructions given, modified and refused and we are satisfied there was no error in giving, modifying and refusing instructions.

The evidence sustains the verdict and the judgment is affirmed.

Judgment affirmed.

JOHN U. MUSICK
V.
F. H. GATZMEYER.

Sales—Real Estate and Insurance Business—Partnership—Fraud—Evidence.

1. The commission on sales made by real estate brokers is the basis of the value of their business, and the commission is on the value of land and not on the number of tracts on his list, and the expression of an opinion by such broker to a person contemplating the purchase of an interest in his business, as to the amount of profits to be made in such business can not be accepted as a representation of a fact, but must be looked upon as simply an opinion, and not the basis of a right to rescind such contract duly entered into.

2. The representations of the seller that the number of properties on his books has more than doubled within a given time, if untrue, to be deemed fraudulent to the extent that it may be made ground for rescinding the contract, the person to whom they were made must have relied upon them and have been deceived thereby, and it must further be shown that the statements were relied upon to the extent that but for them the contract would not have been made, and this reliance on such statements is a matter to be proven by the plaintiff, and may be disproven by the defendant.

3. It is proper to ask the plaintiff in such case, upon cross-examination, the interest sold being in a real estate and insurance business, whether he would have bought had nothing been said as to the amount of property on the books for sale, or of insurance business being done.

4. A person induced to part with his property on a fraudulent contract, may, on discovering the fraud, avoid the contract and claim a return of what has been advanced upon it, but he must do so at the earliest practicable moment.

[Opinion filed March 3, 1893.]

APPEAL from the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Mr. SOLON A. ENLOE, for appellant.

Messrs. E. R. DAVIS and A. FLANNIGEN, for appellee.

MR. JUSTICE PHILLIPS. Appellee brought suit against appellant, alleging in his declaration that the plaintiff, at the request of the defendant, bought a one-half interest in a real estate, insurance, house-building and loan association business, which the defendant was then carrying on in East St. Louis, for the price of \$1,250, and avers that the defendant represented the business was a good paying one and they would make money, and plaintiff, confiding in the representations, bought the same, and at the time the representations were so made, the business was of no value, and brings this action to recover the purchase money paid. The sale was made about October 1, 1891, and the plaintiff at once entered the office and became a partner in the business, having access to all books and papers of the firm, and compiled the list of property and issued a bulletin in October, about two weeks after he went into the firm, and continued to exercise his rights as a member of the firm, until about the 6th of February, 1892. The fraudulent representations that plaintiff claims, were first made in a letter of defendant to plaintiff, inclosing a bulletin, in which he wrote, "I inclose you herewith a copy of our real estate sheet, showing list of property handled by us, which has more than doubled since the issue of the sheet inclosed," and further states that in the conversation between the plaintiff and defendant, the defendant made false representations as to what the value of the business had been for the year preceding, and as to the amount of profits the firm would make for the ensuing year.

The evidence of the plaintiff is, that when he made the

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bulletin in October he did not know how many tracts were listed when he went into the firm and did not know the relative value of the property listed on the first and second bulletins and made no investigation as to the value or number, and testifies that the second bulletin was but little larger than the first. The defendant testifies that the amount of property in the second bulletin, in value, is about double that in the first. The commission on sales made by real estate brokers is the basis of the value of their business, and the commission is on the value of land, and not on the number of tracts, and the expression of an opinion as to the amount of profits to be made could hardly be accepted as a representation of a fact by even the most credulous, for a representation as to the amount of profits to be derived from commissions on sales and the business of insurance agents can be but the expression of an opinion, and any such representations testified to as made by the defendant were evidently merely the expression of an opinion (*Miller v. Young*, 33 Ill. 354), and not the basis of a right to rescind, and if the representations as to the list having doubled were made, and were untrue, to be deemed fraudulent to the extent that it may be made the basis or ground for rescinding a contract, the person to whom they are made must have relied upon them and have been deceived thereby, and it must further be shown that the statements were relied upon to the extent that but for them the contract would not have been made. *Fauntleroy v. Wilcox*, 80 Ill. 477; *Merwin v. Arbuckle*, 81 Ill. 501.

And this reliance on such statements is a matter to be proven by the plaintiff, and may be disproven by the defendant. And the defendant, as appears from the record, answered that he would have bought the one-half interest if the statement in the letter that the amount of property listed had doubled since the last bulletin, had not been made. The plaintiff testifies that similar representations had been made by the defendant as to the list of property having doubled and the value of the business shortly prior to the contract of sale, and while permitted to testify to

that fact, yet, on cross-examination, the court sustained objection to the following questions asked him: "Suppose he hadn't said anything about the insurance, would you have bought it then? I want to ask you the question whether or not you would have bought an interest in that firm if J. U. Musick had said nothing about the amount of property he had on hand for sale? I will ask you if you would have bought an interest in that firm if J. U. Musick had said nothing about the amount of insurance they were doing?" These questions were proper, and the evidence material, and it was error to sustain the objection to same. And the plaintiff, having access to the books and papers of the office, could determine the list of property for sale and make a list of the same within two weeks after he became a member of the firm, and with all this knowledge, continued to be a member of the firm until February 6th, following.

It is held in *Hall v. Fullerton*, 69 Ill. 448: "A person who is induced to part with his property on a fraudulent contract, may, on discovering the fraud, avoid the contract and claim a return of what has been advanced upon it. He has his election to affirm or disaffirm the contract. But if he would disaffirm the contract he must do so at the earliest practicable moment after discovery of the fraud."

The judgment must be reversed and the cause remanded.

Reversed and remanded.

GARTSIDE COAL COMPANY

V.

WILLIAM TURK.

Master and Servant—Negligence of Master—Injury to Servant—Engine—Orders of Vice-Principal—Evidence.

1. It must be presumed that jurymen have ordinary intelligence and comprehension.

Gartside Coal Co. v. Turk.

2. It is proper in a personal injury case to show the authority an engineer had by virtue of his position as engineer and topman in a coal mine, to give directions to those working under him; also to admit evidence as to the condition of certain machinery, and the length of time it had been in the condition testified to by the witness, in view of an averment in a declaration that a defendant was bound to keep his machinery "in reasonably good and safe condition," and that it did not.

3. In an action brought to recover for a personal injury to a servant received in the course of his employment, he not having been instructed as to the dangers incident thereto, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of Jackson County; the Hon. A. K. VICKERS, Judge, presiding.

MESSRS. WALKER & EDDY and SMITH, McELVAIN & HERBERT, for appellant.

MESSRS. R. J. STEVENS and HILL & MARTIN, for appellee.

MR. JUSTICE SAMPLE. This action was brought by appellee to recover damages for an injury sustained while trying to start a single-cylindrical engine of appellant.

The engine was used to operate the shaker that screened the coal as it was brought up from the mine. Occasionally the engine would stop on the center, when it had to be pushed off by hand. It had so stopped and was being started at the time of the injury here complained of.

It was in charge of one Biggs, who was stationed some feet above the engine and operated it by a rod extending down to the throttle valve. Below, and a short distance from the engine, the appellee, Turk, together with one Jones, was at work. Appellee had been working for appellant but a few days at the time of the accident and was not familiar with the use or operation of the machinery. When the engine stopped on the center the engineer, Biggs, ordered the appellee and Jones to start it.

In order to do so they had to climb up a ladder to where the engine was located. From the evidence in this record

it appears that the appellee arrived at the engine shortly before Jones, and pulled on the fly-wheel to get the engine off its center; when Jones came up he opened the throttle-valve to give more steam. This act of Jones appears now clearly to have been done while Turk was tugging at the fly-wheel. The engine did not start and Biggs called down to Turk to pick up an iron bar and put it under the crank and pry the engine off the center in that manner. Turk complied with the order, and as he threw his weight on the bar the second time the engine suddenly started with a jerk or jump, and before Turk could get off the bar it caught him in the crotch, lifted him up and threw him over the fly-wheel into the cogs, whereby his right arm was so crushed that it had to be amputated. It further appears from the evidence that Biggs, the engineer, was not only directing the appellee as to the proper method to be used to start the engine, but was watching the men below in the operation.

It also appears by the evidence of several engineers that it is a dangerous undertaking to attempt to pry an engine off the center, as was done in this case, while the steam was turned on. This evidence is not contradicted in this record. It is clear from the evidence that the appellee was ignorant of such danger, and although it was known by the foreman who employed him from former custom that he would be called upon to do such work, he was neither instructed in the performance of such duty nor warned of the danger attending it.

It further appears that the man in charge of the engine had, at least by long custom, the authority to control and order the men working below to assist in starting the engine when it stopped on the center, and had the authority to direct them as to the method of doing such work. It also appears in this record that before Jones touched the throttle-valve there was so much steam on that it was gushing out of the cylinder-head. In view of these facts, we hold that it was negligence for the appellant to require the appellee to perform such dangerous work without instructions or warning him of the peril he assumed. The

performance of this duty, under the circumstances as shown in this record, was a special risk, notice of which was not given by the nature of the employment.

For failing to give such notice under such circumstances, when an injury occurs in consequence thereof, a liability arises. See *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100, and authorities there cited.

This record establishes a stronger case for the appellee than the former one (40 Ill. App. 22), and makes clear what was before somewhat obscure, and, as it shows, this case was tried on the evidence given on behalf of appellee alone. We hold, as before, that there was no negligence in the use of a single-cylindere engine, and that there was not necessarily any danger in starting it after it had stopped on the center if there was no pressure of steam. By the former record it appears that Jones put on the steam without the knowledge of Biggs and at a time when Biggs was about to shut it off entirely. In this record it appears that Biggs knew Jones turned on the steam, after which time and with that knowledge, he ordered the appellee to do an act which he, under the evidence in this record, must have known was dangerous, of which danger the appellee was ignorant.

While the engine was on the center, of course, no amount of pressure would start it; but when pushed beyond the center the greater the pressure the quicker, more sudden and violent would be the starting. The engineer must have known this, yet with this knowledge he put appellee in a dangerous position, which resulted in the injury complained of. The act of Turk was not voluntary, as claimed by appellant; what he did was in pursuance of the order of one authorized to give it.

The contention by appellant that the evidence does not make a case under the declaration is not sustained. Each count of the declaration in effect avers that the shaker was operated by steam; that the shaker had stopped, and that it was necessary to start it by hand, as it could not be started in the ordinary way by the application of steam. The gist of the action, as averred in the third and fourth counts of

the declaration, is the negligence of appellant in requiring appellee, who is averred to have been ignorant of the use and operation of such machinery, to start it in the way and manner directed. There was no error in admitting the evidence of the witnesses, Verbal, Huggins and Glasby. The evidence of the two former related to the authority of Biggs, the engineer, while that of the latter related to the condition of the machinery in 1889. It was clearly proper to show the authority Biggs had, by virtue of his position as engineer and topman, to give directions to those working below. As one count of the declaration averred that it was the duty of the defendant to keep its machinery "in reasonably good and safe condition," and that it did not do so, it was not improper to admit evidence to show the condition of this machinery, and the length of time it had been in the condition testified to by the witness, in order to establish the fact of such condition as averred, and to bring notice home to appellant. The instruction given for appellee was not erroneous.

The part of the instruction complained of is as follows :

"In determining the amount of damage, if you shall so find for the plaintiff, you may and should take into consideration all the facts and circumstances *attending the injury*, as disclosed to you by the evidence."

The point of the objection is based upon the words in italics, and it is contended that the jury were thereby permitted and directed to consider other than the physical facts attending the injury; that is, that they might consider, in estimating the damages, that the machinery was defective, and that Biggs was grossly negligent, etc. We do not think the instructions will, fairly considered, bear such a construction; those matters relate to the question as to the guilt of the defendant, and the jury must have so taken them. It must be presumed that jurymen have ordinary intelligence and comprehension. It is apparent, after reading the whole instruction, that the part above referred to was intended to be general in its nature, followed, as it is, by stating what particular facts and circumstances attending the injury

Kluge v. Kluge.

should be considered, as "the nature and extent of the plaintiff's injury, his pain and suffering, if any, resulting from such injury, the permanent nature of the disability caused thereby, if you find the disability to be permanent," etc., etc.

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.

F. CARL KLUGE

V.

MARGARET KLUGE ET AL.

Mortgages—Foreclosure—Limitations.

1. Payments on a note made after the statute of limitations of ten years went into effect, viz., July 1, 1872, would not operate to extend the time under the previous statute of sixteen years, but under the new statute.

2. Upon a bill filed to foreclose a mortgage this court declines to interfere with a decree dismissing the same, the defense being based upon the statute of limitations.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of Pope County; the Hon. O. H. HARKER, Judge, presiding.

MESSRS. MORRIS, MOORE & MORRIS, for appellant.

MESSRS. ROSE & SLOAN, for appellees.

MR. JUSTICE SAMPLE. The appellant, as an assignee of a note and mortgage, filed his bill to foreclose the same. The defendants, in their answer, interposed various defenses, among others the statute of limitation, upon which alone the decree dismissing the bill was based. The note and mortgage were executed by Carl Kluge, the appellant's father, to Hoffman, on the 18th day of June, 1868, payable

June 18, 1871. The interest was paid annually up to the year 1877, when, in four different payments made in 1877, the amount of note and all interest was paid to Hoffman, the last on the 27th day of October of the latter year, who, on the 10th day of November, 1877, assigned said note and mortgage to appellant. It is made a question of fact by the pleadings and the evidence, as to whether the mortgagee or the assignee—the appellant—paid the money on the note; but as the court, in the decree, did not pass on that question, we do not feel disposed to do so, and do not deem it necessary to a final disposition of the case. The bill to foreclose the mortgage was filed on the 17th day of March, 1891.

At the time the mortgage and note were executed, the statute of limitations of sixteen years applied. On its face, that limitation expired June 18, 1887. If it be conceded that the payment of the interest on June 18, 1872, extended the time under the old statute, it would be for only one year beyond the time above stated, making the limit June 18, 1888. The statute of limitations of ten years went into force July 1, 1872, and payments on the note made thereafter would not operate to extend the time under the old statute, but under the new statute. *Drury v. Henderson*, 143 Ill. 315; *Harding v. Durand*, 138 Ill. 515.

Hence, under the last payment, made on October 27, 1877, the extension under the new statute would only run to October 27, 1887, a shorter time than the extension by the payment of June 18, 1872, under the old statute of limitations. So that from any point of view, the note and mortgage were barred by the statute of limitations, unless, as claimed by the appellant, it should not in this case be enforced.

The record does not disclose to us, neither is any point of fact or law suggested, that would prevent the running of the statute, or take the case out of its operation. It is not claimed that the father of the appellant practiced any fraud other than what might morally be inferred from a failure to keep his parol promise to pay the appellant, if

L. E. & St. L. R. R. Co. v. Lanter.

it should be conceded that he made such a promise. It is not claimed that a mere verbal promise to pay a note under the statute of limitations of 1872 would extend the time of payment or revive the note. Besides, the record does not disclose that any promise was made to the appellant or his agent, so that it is difficult to perceive on what grounds such promise, if made or stated to others, fraud could be predicated.

It is urged that the evidence shows that the father agreed to make over the place to the appellant, and that such agreement was put in writing. The appellant knew of no such agreement, as he testified, and the court below might well say in view of the evidence on that point, that it was not credible. If such an agreement was made, the action should have been based upon it, and not upon the mortgage, against which the statute of limitations had run. After the bill to foreclose the mortgage was filed, the defendant filed a cross-bill for partition of the premises, which was undisposed of at the time the decree on the original bill was entered, the hearing of which was continued. We see no error in this course of proceeding. Whatever right this appellant may have on account of the payment of taxes or other claims against the real estate other than the mortgage disposed of by this decree, may be considered and passed upon at that hearing. The decree is affirmed.

Decree affirmed.

L. E. & ST. L. RAILROAD COMPANY

v.

JOSEPH LANTER.

Railroads—Highways—Laying of Tracks in—Damage to Private Individual.

1. Where the evidence in a given case does not disclose how the public obtained the right of way for a public highway, the presumption of law will be that only an easement was secured.

2. In an action brought by a private individual to recover from a railroad company damages arising from the construction of its track along and within a public highway with the consent of the commissioners of highways, a new highway being opened up at some distance away with the sum paid as damages by said company, such use and occupancy having caused the abandonment of the old highway, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

Messrs. G. & G. A. KOERNER, for appellant.

Messrs. TURNER & HOLDER, for appellee.

MR. JUSTICE SAMPLE. The appellant located and constructed its railroad track along and within a public highway by the consent of the commissioners. The track, as appears by the resolution of the board, was to begin at the center of Sec. 17, on the west, and run east to the center of Sec. 15, in town 1 north, range 6 west, in St. Clair County, Illinois. The appellee was the owner of a portion of the northeast quarter of Sec. 16, extending on the south down to the center of the section, on which, within sixty-four feet of the south line, he had erected substantial buildings. His house fronted to the south on the public highway. The horse lot adjoining his barn, also extended to the highway. He had lived on those premises for many years, the highway in front of his house forming the outlet for travel. When the railroad track was constructed the highway was rendered impassable. The railroad company, in consideration of the grant, had paid to the commissioners several hundred dollars, with which they located and improved a highway one-half mile further south. The arrangement, as shown by the evidence and the conduct of the parties was, that the highway in which the track was laid should be, as it was, abandoned, as neither the railroad company nor the highway

commissioners thereafter attempted to put it in condition for travel. The appellee brought suit for damages and recovered a verdict and judgment thereon for \$900.

The declaration alleged specific and special damages arising from the construction of the railroad tracks, to which the evidence was confined by the court. It is urged, as grounds of reversal, that the evidence does not show that appellee owned the fee of any part of the land on which the track was laid; that if it does, the appellee consented to the laying of the track and can not, after the act, be heard to object; that the verdict is not warranted by the evidence, and that the court erred in admitting evidence, and in giving and refusing certain instructions. The evidence shows that the appellee owned the fee down to the half section line over which the track was authorized by the commissioners to be laid, and where it was laid. The evidence does not show how the public obtained the right of way for a public highway, but in the absence of such proof the presumption of law will be that only an easement was secured. The evidence fully warrants the verdict as to the amount of damages, and while it was not strictly proper to permit on cross-examination to draw out from the witness, Perrin, his estimate of the damages, yet as it evidently tended to reduce them, we think it was harmless error.

The appellee did not induce or solicit the appellant to lay its track in the highway. He was at no time content with such an arrangement, and absolutely, in his quiet way, refused to release the damage that he believed would arise therefrom. Neither by his conduct nor language is he estopped from maintaining this suit. The point made on the instruction is that they allowed the jury to consider damages other than that which would be special to the appellee. We do not think it well taken for the reason that no evidence was offered of any damages other than those that under the authority of *L. E. & W. R. R. Co. v. Scott*, 132 Ill. 429, were of a special nature. There is another reason which might be given, but as the matter has not been discussed by counsel we will not now assign it. The judgment was right and will be affirmed.

Judgment affirmed.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COM-
PANY

V.

EDWARD STROTZ.

Railroads—Negligence—Fire—Sparks.

1. This court will not consider an alleged error in the modification of an instruction, the instructions not being incorporated in the abstract.

2. In an action brought to recover for damages alleged to have been occasioned by fire set by sparks from a locomotive, where it is shown that such sparks set the fire, a *prima facie* case is established for the plaintiff, and the burden is cast upon the defendant to rebut the liability.

3. This court declines, in view of the evidence, to interfere with the judgment for the plaintiff in the case presented, wherein it was sought to recover for damages caused by such a fire.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

MESSRS. TURNER & HOLDER, for appellant.

MR. WILLIAM WINKELMANN, for appellee.

MR. JUSTICE SAMPLE. This suit was brought to recover damages alleged to have been occasioned by fire caused by sparks said to have been emitted from the locomotive engine of appellant. The case was tried before a jury, which returned a verdict in favor of the plaintiff for the sum of \$70, which was approved by the court.

The fire originated outside of the right of way of appellant. The evidence justifies the verdict in finding that the fire was caused by sparks thrown from the locomotive. Such fact being established, a *prima facie* case was made for the plaintiff, and the burden was cast upon the appel-

47	342
58	161
47	342
70	519

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lant to rebut the liability thus arising by presumption of law. Whether it did or not, was a question of fact for the jury and the court below. While not entirely satisfied with the finding on this point, yet we do not feel disposed to say that it was unwarranted.

Complaint is made of the modification of an instruction asked by the appellant. As none of the instructions given or refused on either side are incorporated in the abstract, which is a violation of an imperative rule of this and other appellate courts, we decline to consider that assignment of error. The judgment is affirmed.

Judgment affirmed.

THE ALTON LIME AND CEMENT COMPANY
V.
JAMES CALVEY.

Master and Servant—Negligence of Master—Personal Injury to Servant—Quarry—Unexploded Charge of Dynamite—Fellow-Servants—Evidence—Instructions.

1. In the use of a dangerous agent like dynamite, great care must be taken to prevent accidents. A high degree of diligence rests upon an employer using such explosive, to see that unexploded dynamite is not left where employes are directed to work, and it is a question of fact in a given case whether such care was or was not used.

2. In accepting employment in a quarry a person can not be said to assume the risk of finding unexploded dynamite in the rock he is called upon to break.

3. Where it is sought to remove such unexploded charge, care should be taken that all be removed, or at least employes should be warned of the presence of a portion thereof.

4. A witness should not be asked whether a certain occurrence was one of the risks of a given employment. Such question is for the jury, in view of all the facts and circumstances of the case.

5. Instructions must always be considered with reference to the facts as developed by the evidence.

6. An instruction authorizing the rejection of all of a witness' testimony if he has sworn wilfully false, without it is supported by other

unimpeached witnesses, should not be given. It is proper to direct the jury that the testimony of such witness may be entirely disregarded except wherein it is corroborated by other credible evidence.

7. An instruction assuming as a basis for a declaration of law as to non-liability, a fact directly the converse of that which the undisputed evidence shows to have existed, should not be given.

8. The ex-servant who placed the dynamite in the rock was not the fellow-servant of the plaintiff herein.

[Opinion filed March 11, 1893.]

APPEAL from the City Court of Alton, Illinois; the Hon. J. E. DUNNEGAN, Judge, presiding.

Messrs. A. & J. F. LEE and A. W. HOPE, for appellant.

Messrs. McNULTY & BAKER, for appellee.

MR. JUSTICE SAMPLE. This suit was brought by appellee to recover damages for a personal injury alleged to have been caused by the negligence of appellant.

The declaration avers, in substance, that the appellee was employed to quarry rock, and that it was the duty of appellant to keep the quarry in a reasonably safe condition for that purpose; that appellant did not perform its duty in that regard, but allowed its quarry to be and remain in an unsafe and dangerous condition by permitting an unexploded charge of dynamite or powder to remain in the quarry, and that appellee, while at work in such quarry, in ignorance of the presence of such dynamite or powder, and while in the exercise of due care, struck a stone which caused said dynamite or powder to explode, resulting in injuring him. On trial before a jury, a verdict was rendered in favor of appellee for the sum of \$150, which was sustained by the court. The principal errors assigned are that the evidence does not sustain the verdict, and that the court erred in giving and refusing to give certain instructions.

That the appellee was injured by an explosion of dynamite that was left in the quarry where he was directed to work is not disputed.

This being the fact, the only questions on the merits are, First, was the appellant negligent in leaving it there? Second, did the appellee exercise ordinary care for his own safety? It appears from the evidence that the dynamite had been left in the quarry some time before the accident by one who had been, but was not at the time of the injury, in the appellant's employ, and was discovered the morning of the day of the accident, and the foreman had directed that it be removed. The order was attempted to be complied with, but, as was afterward ascertained, the dynamite was not all removed; a part of it exploded and caused the injury complained of. The explosion was caused by appellee striking a rock as he was pursuing his work at the place directed.

The appellee knew that some unexploded dynamite had been found, but it does not appear that he knew that it was found at the place where the explosion took place. Besides, he had heard the order for its removal and doubtless supposed it had all been taken away. It seems that appellee had not been using dynamite for an explosive in his work, and, as he testifies, had had no experience with it. It is doubtless the law that in the use of such a dangerous agent as dynamite great care must be used to prevent accidents. A high degree of diligence rested on the company to see that unexploded dynamite was not left where it directed its men to work. It was a question of fact for the jury whether such care was used by the appellant. After an examination of the evidence, we are unable to say the finding is unsupported. The foreman, Turk, testified that if the appellee had been careful he might have seen the dynamite before he struck the rock which caused the explosion. If this is true, then the company, whose duty it was not to allow any dynamite to remain in the quarry that by the exercise of proper diligence could have been discovered, should have had it removed. The appellee was not handling dynamite and did not expect to find it there. We do not think his negligence contributed to the accident. It is urged that he was a fellow-servant with the workman who

was ordered to remove the dynamite, and also with the one who had left it in the quarry prior to appellee's employment. The facts do not warrant that conclusion, and that question is not considered involved in this case.

The company impliedly assured the appellee at the time of his employment that the quarry was in a reasonably safe condition. It appears from the evidence that it was not in that condition, and thereby the appellee was injured. It is true that he took the ordinary risk of such service, but it can not fairly be said that he should expect to find unexploded dynamite in the rocks he was required to break. In addition to this view, it is shown that only a part of the charge of dynamite was removed under the direction of Turk, the foreman. He should have had diligent search made for the residue, or at least have warned appellee of the fact, so as to put him on his guard. This was not done until after the accident, when a search revealed the remainder of the charge, which was then taken away and buried. It was not error for the court to refuse to allow the following question to be answered, viz.: Was the explosion one of the risks of the service? Such a fact is not to be determined by the opinion of witnesses, but by the jury, from all the facts and circumstances. Serious objections are made to the instructions given on behalf of the appellee. Instructions must always be considered with reference to the facts as developed by the evidence. In this case it is conceded that the appellant knew, by its foreman, which in legal effect was the same as if it had been presented to the directory at a regular meeting, that unexploded dynamite was left in the quarry where appellee was required to work. With this knowledge, did the appellant negligently allow it to remain? Or, in other words, did it exercise reasonable care and diligence in view of the danger attending such an explosive, after it had knowledge of its presence, to remove it? This is the view presented by the first instruction, and while it might have been more carefully worded, yet we do not think it could have misled the jury.

The second instruction declares it was the duty of the

appellant to remove such unexploded dynamite, or at least so guard it as to prevent harm to its employes. As we have heretofore stated, that was its duty. But it is said that the instruction is imperative and unqualified as to the diligence and care to be exercised to do so.

It must be remembered, in this connection, that the foreman testified that the dynamite could have been readily seen, at least by one looking for it, and this was urged as a reason for non-liability. This instruction might properly have been qualified also, but it did not, in our judgment, mislead the jury in view of the evidence. The third instruction, which declares in effect that Stugle, who, it is claimed by appellant, had put the dynamite there before he left appellant's employment, was not a fellow-servant with appellee, states the law correctly. The fourth and fifth instructions were properly given and state the law correctly. The court gave instructions for the appellant which were as broad and favorable to it as could be reasonably asked. Error, however, is assigned on the refusal of the court to give two instructions asked on its behalf. One instruction was to the effect that if any witness had "sworn falsely and willfully to any material fact," then the jury might reject all of such witness' testimony, "whenever any facts testified to by him are not confirmed by other witnesses whom they do not find have sworn willfully and falsely." This instruction is peculiarly constructed and, for that reason, is subject to criticism, if not rejection. But it is, in effect, like one which was held to be erroneous by the Supreme Court in the case of *Angelo v. Faul*, 85 Ill. 106.

This instruction authorizes the rejection of all of a witness' testimony, if he has sworn willfully false, without it is supported by other unimpeached *witnesses*, disregarding the common experience of courts in trials that frequently facts and circumstances developed by the evidence, are the very strongest corroboration and confirmation of the truth of testimony. The Supreme Court, in the above case, recognizes this palpable fact. Had the instruction concluded that such witness' testimony might be en-

tirely disregarded, except wherein it was corroborated by "other credible evidence," then such an expression would have included, not only the evidence of the credible witnesses, but facts and circumstances as well, and would have been unobjectionable, and, doubtless, in such form, would have been given by the court. There was no error committed in its refusal.

The second refused instruction was properly refused. It asserts that if dynamite was found in the quarry, and appellee knew it, and continued there *without any promise to remove it*, and he was injured, without exercising due care, then he can not recover. The trouble with this instruction is the portion italicized. The appellant not only did promise to remove it, but actually gave the order to do so in the presence of the appellee, which at least was equivalent to a promise to the appellee himself, and was also a recognition of the duty it owed to him, as a matter not only of common prudence but of humanity. After such promise or order, appellee had a right to suppose that order had been properly executed with that degree of diligence and care that the danger of allowing it to remain required. The instruction assumes as a basis for a declaration of law as to non-liability, a fact directly the converse of that which the undisputed evidence shows, viz., that he did *not* continue there without any promise to remove it. The instruction was properly refused.

There being no material error in the record, the judgment is affirmed.

Judgment affirmed.

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THE OHIO & MISSISSIPPI RAILWAY COMPANY

v.

CHARLES W. McGEHEE.

Railroads—Removal of Farm Crossing—Sec. 1, Chap. 114, Starr & C. Ill. Stats.—Farm Crossings—Damages.

1. Every statute imposing a duty upon one person for the benefit of another implies the existence both of a liability and a remedy, though

O. & M. Ry. Co. v. McGehee.

none is specifically provided, where an injury results from the failure to perform such duty.

2. Where, after a farm crossing has been put in, it is removed and not replaced by the company, so that a landed proprietor can not cross the railroad track at any place reasonably convenient to his property, an action at common law, based upon the statutory duty of the company, will lie for damages sustained thereby, and the burden is on the plaintiff, in such case, to show what amount of damages was caused by such act.

3. In case of the removal of such crossing, crops in fields usually approached thereby should be cared for and harvested and the damages should be limited to the additional expense occasioned by such removal.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of Gallatin County; the Hon. S. Z. LANDIS, Judge, presiding.

Messrs. CARL ROEDEL and POLLARD & WERNER, for appellant.

Messrs. PILLOW & MILLSPAUGH, for appellee.

MR. JUSTICE SAMPLE. The appellee brought this suit to recover damages arising, as alleged, from the taking up and removing his farm crossing by appellant. The second count, upon which appellee relies, avers that he was in possession of and cultivating in corn a certain tract of land, and had matured a large crop; that appellant owned and operated a railroad that passed through said farm, and it became and was its duty to construct and maintain a farm crossing so he might pass over the same and thereby reach different parts of his land; that appellant had constructed such crossing, but its servants, in the line of their employment, tore up and destroyed the same and refused to rebuild; that the crossing was destroyed without notice to appellee and was not discovered by him until it was too late to give the statutory notice and have the same rebuilt before said corn in the field was destroyed; that said crossing was necessary to the enjoyment and use of said land, and the securing of the crops. On trial before a jury a verdict was returned in

favor of appellee in the sum of seventy dollars, which was sustained by the court,

The errors assigned relate to the sufficiency of the evidence to sustain the verdict, and the instructions given and refused.

The errors assigned as to the instructions, go to the foundation of the action, the contention of appellant being that an action will not lie against a railroad company to recover such damages; that the statute declares the kind of injury for which damage may be recovered, which is exclusive of any other, and that in this case the only remedy is to require the company to build the crossing; or, on failure, for the land owner to build, and recover the statutory damages. Sec. 1, Chap. 114, Par. 62, Ill. Stats., provides: "That every railroad corporation shall erect and thereafter maintain fences * * * suitable and sufficient to prevent cattle * * * or other stock from getting on such railroad * * * with gates or bars at the farm crossings of such railroad, which farm crossings shall be constructed by such corporation when and where the same may become necessary for the use of the proprietors of the lands adjoining such railroad; and shall also construct * * * and thereafter maintain at all road crossings now existing or hereafter established, cattle guards * * * sufficient to prevent cattle * * * and other stock from getting on such railroad; and when such fences or cattle guards are not made as aforesaid, or when such fences or cattle guards are not kept in good repair, such railroad corporations shall be liable for all damage which may be done by the agents, engines or cars of such corporation to such cattle * * * or other stock thereon, and reasonable attorney's fees." It will be observed, first, that this section only declares a liability for failure to construct or maintain fences or cattle guards; second, that such liability for such failure is limited to damages done by the agents, engines or cars of such corporation to cattle or other stock getting on such railroad; third, that the farm crossings are required "for the use of the proprietors of the land adjoining such railroad;" fourth, that no liability is

declared by this section for a failure to construct or maintain such farm crossing—it merely imposes the duty.

In this view, the case is very different from that of *P. D. & E. Ry. Co. v. Schiller*, 12 Ill. App. 443, relied on by appellant, where the injury was to crops, occasioned by hogs getting through insufficient cattle guards and fences into the plaintiff's field. In such a case the statute declares a liability, and the kind of injury from which such liability arises. The court held that in such a case the statute prescribed a special duty and enforced its performance by a special liability which in that case, under the averments of the declaration, was exclusive.

In the case under consideration, the statute, as heretofore suggested, does not enforce the special duty by providing any special or other liability for damages done. But the rule is fundamental that every statute imposing a duty on one person for the benefit of another, implies the existence both of a liability and a remedy, though none is specifically provided, where an injury results from the failure to perform such duty. In *Sedgwick on Statutory and Constitutional Law*, p. 92, it is said: "And the general rule that in every case where a statute enacts or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law in question, is declared by the text writers of our jurisprudence. If a new right is created by statute and no remedy prescribed for the party aggrieved by the violation of such right, the court, upon the principle of a liberal and comprehensive interpretation of the statute, will presume that it was the intention of the legislature to give the party aggrieved a remedy by a common law action for the violation of his statutory right, and he will be permitted to recover in an appropriate action founded upon the statute." Citing several authorities in support of the text.

The provision of the statute by which the railroad company may be compelled to construct such farm crossing, or pay another for doing so, does not afford a remedy for a

wrong done, nor provide for recompensing the party aggrieved for the damages sustained. It merely provides a method for enforcing a statutory duty, regardless of the question as to whether or not damages have been sustained. If that was all the remedy, a portion of the crossing sufficient to make it impassable might be removed frequently, in which case the proprietor of the land would be limited in his right of redress, merely to give the ten days notice after each removal to repair the same. Doubtless, it is true, primarily, that until the proprietor has given notice where he wants the crossing located, or it is determined where it is "reasonably convenient," as the word "necessary" is interpreted to mean in the case of *Chalcraft v. L. E. & St. L. R. R. Co.*, 113 Ill. 86, no consequential damages could be said to arise. But after the crossing is actually put in *and thereafter removed by the company* and not replaced, so that the proprietor can not cross the railroad at any place reasonably convenient, then it is thought an action at common law, based upon the statutory duty, will lie for damages sustained thereby. If our view of the law is the correct one, the court did not err in refusing to give to the jury the defendant's second and third instructions.

The second of plaintiff's instructions is erroneous in this, that it raises the question of mitigation of damages, which is not considered involved in the case. The only question in the case as to damages was what was the amount sustained by reason of the defendant's alleged wrongful act. The burden was on the plaintiff to show what amount of damages was caused by such act. He could not sit down and let his corn rot in the field merely because the most convenient way of access to it had been removed by defendant. It was his duty—affirmative duty—to proceed in the most practicable way remaining to gather his corn. The removal of the crossing did not cause the injury, except in so far as it made the removal of the corn to the south side more inconvenient and expensive. The act of removal of the crossing was not malicious, and the injury occasioned by the rain setting in earlier than usual, or falling in un-

St. L., A. & T. H. R. R. Co. v. Carr.

usual abundance, was not the natural result of the misconduct which could reasonably have been foreseen or expected. *Phillips v. Dickerson*, 85 Ill. 11.

The plaintiff testified that as much as thirty days intervened between the discovery that the crossing was gone and the setting in of the wet weather, during which time he was working in another field. Under the evidence in this record, the damages should have been limited to the additional expense occasioned by the removal of the crossing, which, as shown by the evidence, was three cents per bushel on 650 bushels of corn, or \$19.50.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

THE ST. LOUIS, ALTON & TERRE HAUTE RAILROAD
COMPANY

V.

AMERICA CARR, ADMINISTRATRIX.

Railroads — Negligence — Personal Injury — Intoxicated Passenger — Knowledge of Condition by Servants of Company — Station Agent — Newsboy.

1. If servants of a railroad company knew that a passenger on one of its trains was in a state of unconsciousness, through intoxication, and knew that while in that condition he was sitting on the rear steps of the last car of said train while the same was in motion, and permitted him to remain there, whereby he fell off and was killed, the company is liable in damages.

2. The law does not, however, as a rule, impose the duty on railroad companies to protect their passengers, while on their trains, from the passenger's own negligence. Their duty is to furnish a safe and convenient mode of transportation, of which the passenger is to avail himself, and then safely, in that mode, to transport him. They do not have to watch the doors or windows to prevent passengers from jumping or falling off their trains.

3. If a passenger voluntarily becomes intoxicated, the law does not

impose the duty on the common carrier to place a guard over such passenger to prevent him from injuring himself, or placing himself in a place of danger.

4. In the case presented, this court holds that no evidence was introduced to show negligence on the part of any agent of the company, which would create a liability or uphold the judgment in plaintiff's favor.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of Franklin County; the Hon. JOSEPH P. ROBARTS, Judge, presiding.

Messrs. F. M. YOUNGBLOOD and W. S. CANTRELL, for appellant.

Mr. C. H. LAYMAN, for appellee.

MR. JUSTICE SAMPLE. This suit was brought by appellee to recover damages for the death of her intestate caused, as alleged, by the negligence of the appellant.

The case was tried before the judge of the court without a jury and judgment rendered in favor of appellee in the sum of \$5,000, and a motion made for a new trial was overruled. The principal error assigned and discussed is that the evidence does not support the judgment. The declaration in substance charges, that on the 4th day of June, 1890, the appellant was possessed of and operating a certain railroad, extending from Du Quoin, in Perry County, and thence in an east and southeast direction through the County of Franklin, to Eldorado, in Saline County, with locomotive, engine and cars, run and operated thereon by steam power for the transportation of passengers, etc. That the deceased in his lifetime, at Du Quoin, on the 4th day of June, 1890, became and was a passenger on appellant's railroad to be by it for certain fees and reward, then and there paid it by deceased, safely carried from Du Quoin to Benton, on its said railroad. That it thereupon became the duty of appellant to so safely carry deceased from Du Quoin to Benton, and use all due care and caution for his safety and protection. It further charges that appellant

did not so safely carry the deceased and did not use all due care and caution for his safety and protection, but on the contrary the defendant then and there knowing the fact that said deceased, while on its said cars as such passenger, was intoxicated and unaware of the dangerous and perilous situation he was in, knowingly and negligently permitted deceased to sit and remain sitting for the space of one half hour in a state of unconscious intoxication on the steps of the rear end of the rear car of said train while the same was being run at a great rate of speed, and that while the deceased was so sitting, the defendant knowing the fact that he was intoxicated and unconscious of his danger, and in consequence of his so sitting and remaining in such hazardous situation with the knowledge of defendant, and in consequence of the great rate of speed with which said train was being operated at a point one half mile east of Mulkeytown station, on said railroad, the deceased was then and there suddenly and violently thrown from said train down to and upon the ground, in consequence of which fall his skull was fractured and crushed, and he was instantly killed.

The defendant filed the plea "not guilty," upon which issue was joined. A stipulation was filed agreeing that all evidence in the case should be heard under the general issue the same as if properly or specially pleaded. No question arises on the introduction or rejection of evidence, and the primary question before this court is, whether there is sufficient evidence in the record to sustain the finding of the court below on the question of negligence. The evidence discloses the following facts: That the deceased, William Carr, on the 4th day of June, 1890, purchased a ticket for transportation from Du Quoin to Benton, over appellant's road; that he boarded a freight train at Du Quoin about 11 A. M. on that day, which train had attached one passenger car and a "combination car" for passengers, mail, baggage, and express, the latter being the rear car. The seats in the "combination car" were at the front end, as the car was then attached to the train, with a partition between

them and that portion of the car used for other purposes. Entrance to the rear platform was obtained by opening a door in said partition, then follow an alley-way on the south side of said car.

The deceased was somewhat under the influence of liquor when he got on the train at Du Quoin, although there is no evidence to show that any one connected with the railroad company knew that fact at that time. He took a seat near the rear of the passenger apartment of the combination car. The conductor took up his ticket about three miles out from Du Quoin, when Carr laughingly remarked to the conductor, "Say, Barney, I want to get off at Buckner." The conductor says from this remark he surmised that he was intoxicated. There were two brakemen with the train, one looking after the front portion and the other the rear portion of the train. The front brakeman did not know Carr, as that was his first trip over that portion of the road. He saw Carr at Du Quoin on the station platform, but did not see him thereafter so far as disclosed by this record. The rear brakeman knew Carr, and first recognized him when near Mulkeytown, the first station east of Du Quoin. Carr was then, as this witness testified, not very drunk nor very sober. When the train whistled, Carr and another man got up, but as this witness had to attend to his duties, he did not notice whether they went out or not. When the train arrived at Mulkeytown, one witness, who was standing with, or near several other persons, who testified about the same fact, says he saw Carr sitting on the steps of the rear platform of the combination car. The other witnesses, several of them, among others, the station agent, testify that they saw him sitting there as the train passed the depot platform as it pulled out for the next station. All these witnesses thought Carr was intoxicated, although Carr did not move or speak. He sat with his elbows on his knees with his head resting in his hands.

The newsboy got on the train as it pulled out, where Carr was sitting, and he was told by one or more of the bystanders, as the train was moving out, to take Carr in, or

he might fall off; the agent spoke to the newsboy to that effect. It further appears that none of the trainmen heard this request, and none of them saw Carr on the rear steps of the rear car. It further appears that none of the trainmen saw Carr after the time above mentioned, when they respectively state they saw him on the train east of Du Quoin, and between that station and Mulkeytown. The body of Carr was found about one-half mile east of Mulkeytown, where he had evidently fallen from the train. The evidence shows that the newsboy shook Carr, and told him to get inside, and then passed in himself, without noticing whether Carr came in or not, and did not tell the conductor, or either of the brakemen, about Carr or his situation. It further appears that, after the train left Mulkeytown, the conductor went through the train, to collect fare, and, as he says, went through to the rear end of the combination car and that no one was then on the rear platform, or steps; he did not think of Carr, and did not know he was not on the train until after it had passed a station called Christopher, when, remembering the remark that Carr wanted to get off at Buckner, he missed him, and then supposed he had got off at some other station. It also appears that the station agent at Mulkeytown did not signal the train to stop after he saw where Carr was, though he says he could have done so.

There is no witness who testified to the extent of Carr's intoxication, except to say that they thought he was drunk from his appearance as he sat on the rear platform, other than the train men, and one man who saw him on the train and before he got on. While at Mulkeytown he did not speak to any one or move. The witness who testified to seeing him before he got on the train at Du Quoin said he was drunk, but could walk. There is no evidence to show that he was assisted on the train or while in the train, or that he staggered in walking. Apparently, he had command of himself.

It is believed that the foregoing statement contains a full and fair summary of the evidence. It will be observed

that the declaration bases the right of recovery on the alleged fact that Carr was in a state of unconsciousness from intoxication, and that appellant knowingly and negligently permitted him to remain on the rear steps of said coach in a place of danger unknown to him but to appellant, whereby he was killed. There is no claim that Carr was in the exercise of any care for himself. That is sought to be excused by the averment of his condition. It is undoubtedly the law that if the appellant knew Carr, while on its train as a passenger, was in the condition averred, and knew that he, while in that condition, was on the rear steps of said car while the train was in motion, and permitted him to remain there, from which he fell and was killed, it would be liable in this action under such a state of facts; the element of care would not necessarily be involved, as, to knowingly permit a passenger to remain on the train at such a place, with a knowledge of such a state of intoxication, would be gross negligence, amounting to a reckless disregard of human life.

This statement is made on the theory that a railroad company receives a passenger, knowing his condition is such as that averred, or afterward knew such condition, and knows the peril in which such passenger places himself, and knowingly allows him to so remain. It may, however, be stated as a rule that the law does not impose the duty on railroad companies to protect their passengers while on their trains from the passengers' own negligence. Their duty is to furnish a safe and convenient mode of transportation, of which the passenger is to avail himself, and then to safely in that mode transport him. They do not have to watch either the doors or windows to prevent passengers from jumping or falling off the train.

If a passenger voluntarily becomes intoxicated, the law does not impose the duty on the common carrier to place a guard over such passenger to prevent him from injuring himself, or placing himself in a place of danger. If a passenger, however, while in such condition as averred, does place himself in a place of peril, then before the company

can be held liable if an injury results therefrom it must be proven that the agents or servants operating the train knew that fact—not that they should have known it because of any duty by law imposed on the company to watch such passenger—but the actual fact of such perilous position must be brought home to the knowledge of the servants operating such train. The company was not bound to have its servants at the rear platform of the coach on which Carr was sitting at Mulkeytown, for the reason that it owed him no such duty, as he had not indicated any intention of alighting there, and in fact he did not intend to do so. Neither did it owe him any duty to learn or find out where he was on the train. As has heretofore been stated, it is not claimed that there is any evidence to show that any of the men operating the train actually knew or had any reason for believing that Carr was on the platform of the coach from which he fell. The only notice that the appellant had of it was through the station agent at Mulkeytown. He saw Carr on the rear platform as the train pulled past the station. He had no other notice of Carr's condition than that derived from that cursory observation. No one at the station actually knew his condition; there is no evidence to show that Carr spoke or moved or was leaning up against the car for support. The evidence of all the witnesses who saw Carr at Mulkeytown was to the effect that he was supporting his head in his hands with his elbows resting on his knees—not the position for a man who was helpless or in a state of unconsciousness from intoxication. The condition of Carr, so far as the agent could have known it at that time, and his relation to the operation of the train, did not so imperatively require him to take charge of or stop the train until Carr could be removed, that if he did not do so the company would be liable. The agent did not, and could not have known at the time, that Carr was in that unconscious state from intoxication averred in the declaration, and he had no opportunity to learn such fact. We do not find from the evidence that the fact of such condition, if it did exist, was brought to the knowledge of any of the agents of the ap-

pellant conducting the train. It is not claimed that the newsboy was the agent of the appellant. He was engaged in a private enterprise, as much so as an expressman, and no more closely related to the operation of the train or the transaction of the business of the appellant than the mail agent. Had he been the agent of the appellant then it would have been his duty to have investigated and learned the true condition of Carr after having found him on the rear steps of the coach platform, and if he was so drunk as averred, to have taken him inside or taken some measures to have secured his safety.

The court below expressly held that there was no evidence to show negligence on the part of the men operating the train, with which holding we agree, and go further, and hold that there is no evidence to show negligence on the part of any agent of the appellant which would create a liability, or uphold the judgment rendered in this case. The judgment is therefore reversed and remanded.

Reversed and remanded.

47 360
66 206

C., C., C. & ST. L. RAILWAY COMPANY

v.

JESSE ARBAUGH, ADMINISTRATOR.

Railroads—Negligence—Personal Injury—Defective Crossing—Contributory Negligence.

1. It is essential to the right of recovery in a personal injury case, that the person injured was, at the time of the accident, in the exercise of due and reasonable care.

2. In an action brought to recover for the death of a person at a railroad crossing, it being alleged that the same was caused by the defective condition thereof, this court holds, in view of the evidence, that the same was occasioned by her own negligence, and that the judgment against the company must be reversed.

[Opinion filed March 11, 1893.]

C., C., C. & St. L. Ry. Co. v. Arbaugh.

APPEAL from the Circuit Court of White County; the Hon. CARROLL C. BOGGS, Judge, presiding.

Mr. JOHN T. DYE, for appellant.

Messrs. P. A. PEARCE and C. S. CONGER, for appellee.

MR. JUSTICE SAMPLE. The appellee's declaration avers that his intestate lost her life by the negligence of appellant, which consisted in permitting the planks lying along the sides of the rails, at a certain crossing, to become split and splintered so that such splinters projected above the rails, and in permitting the spikes or nails which had held the planks in their places, to become loose and work up, so that they also projected above the rails, thus forming an obstruction to those passing over the track. It is averred that the deceased, while in the exercise of due care, in attempting to pass over said crossing, had her foot or clothing caught by the splinters or spikes aforesaid, and was there held until a locomotive ran upon and struck her so violently, that from the injuries so received, she died. It will be observed that the negligence charged is confined wholly to the condition of the crossing, and does not extend to the operation of the train.

It is clearly proven that the crossing was in the condition averred, and had so been for such a length of time that the appellant may be fairly said to have had notice. The questions of fact presented in this record, however, are, first, did such negligence cause the injury complained of, and second, did the deceased exercise ordinary care for her own safety.

The facts as disclosed by the evidence were that the deceased, who was a middle-aged lady, rather large and fleshy, in company with a young lady, named Katie Heck, were walking along a highway that crossed appellant's track, each with a bucket on her arm. When they got near the crossing they saw a passenger train approaching, which, evidently, was quite close upon them, as is shown by the fol-

lowing conversation that occurred at the time as testified to by Katie Heck, the only eye witness other than the engineer and fireman. Miss Heck testified for the appellee: "She, Mrs. Arbaugh, asked me, 'Do you reckon we can cross the track?' I said, 'No, we can't!' She said, 'I guess we can, if we will hurry.' I said, 'All right, here goes.'"

Q. You hurried and got across barely, and she got hit? A. Yes, sir. Q. When you got on the track you left Mrs. Arbaugh and ran ahead of her? A. Yes, sir. Q. Was she running? A. I don't know. Q. You started to run with a jump, and ran and left her? A. Yes, sir. Q. You know that she paused during the conversation, and you started from nearly a stand still? A. Not quite. Q. Was it not very nearly from a stand still? A. Yes, I believe it was." The evidence of this witness further shows that when she looked around, after getting over the track, she saw that the engine had struck and thrown Mrs. Arbaugh, and as she puts it, was "slinging her around."

The engine was drawing a passenger train. This witness could not tell how far the train was from the crossing at the time she passed over it; she would not estimate the distance in any way. She said she did not know. It appears, however, that she had pointed out the distance a few days after the accident to others in this manner. She stood at the crossing and a man walked down the railroad track, and after he had got down some distance, stopped, and she was asked, "Is this the place?" and she replied, "Yes, about there is the place." That distance was measured and found to be 228 feet. The same method was observed in ascertaining the distance she was from the crossing when she turned to look back for Mrs. Arbaugh, and that distance was measured and found to be thirty feet.

The court permitted the witnesses who made such measurements, to testify to the distance, over the objection of the appellant.

After the witnesses had testified to such measurements Katie Heck was recalled and cross-examined further as to what she said to those witnesses, and about the distance, as

follows: Q. What did you tell Mr. Arbaugh about the location of this train when he made the measurement, a day or two afterward? A. I don't remember what I did say. Q. Is it not a fact that you gave him no definite location of that train? A. I don't know. Q. Is it not a fact that you did not know where that train was? A. Yes, sir. Q. Is it not a fact that you did not know where you were when you turned to see if Mrs. Arbaugh had escaped? A. Yes, sir.

Even if this evidence of measurement by others was competent, as to which it is not necessary now to decide, it is very evident, in view of Katie Heck's statements, that it is not to be relied upon. It is not shown that this young lady could not estimate distance. Her testimony does not indicate that she was stupid or ignorant. Doubtless she was so excited at the time that she could not determine the distance with any degree of accuracy, and therefore, as she testified on the witness stand, she did not know the distance. In view of all the evidence as to the distance the engine was from the crossing at the time Mrs. Arbaugh attempted to pass over the track, it is clear that it was very close, so close that it was considered very hazardous by Katie Heck to attempt to cross, although she started first and was an active young woman, while Mrs. Arbaugh was much older and a tolerably large, fleshy woman.

The theory of the appellee is, that the train was some distance away, and therefore Mrs. Arbaugh would certainly have passed over in safety if she had not been detained by her foot or clothing being caught in the spikes or splinters at the crossing.

That fact is relied upon as evidence that she was so caught and detained, for there is no other evidence of detention. Her dress was torn or ripped a little near the bottom hem, but the dress was of calico, and it is incredible, even if it had been caught on the head of one of the spikes, that she would have been detained thereby a moment of time. Her weight and strength would have instantly torn it loose. There is no evidence that she tripped on a spike or splinter and fell, and it is not claimed that she did. It is evident from the manner in which she was struck, as appeared by

the bruises on her body and the distance that she was thrown, that she had not fallen.

It is considered that the evidence does not sustain the averments of the declaration that the deceased was detained by reason of the defective crossing, or the averment that she was in the exercise of due and reasonable care at the time of the accident for her own safety. This was essential to a right of recovery. While the case is a sad one, yet the judgment must predominate over mere sympathy. The deceased should not have voluntarily and knowingly put in peril her life by attempting to cross the railroad track when an approaching train was so near. To do so was not only not using ordinary care, but was exceedingly reckless, and, as was unfortunately demonstrated, fatally dangerous. In the case of *Ernst v. The Harlem River R. R. Co.*, 35 N. Y., p. 9, Court of Appeals, it is said, where one knows of the immediate proximity of an advancing train, whether the warning by signal be given or not, and having a safe and reasonable opportunity to stop, he voluntarily takes the risk of crossing in front of it, he is guilty of culpable negligence, and forfeits all claim to redress. In the case of *Railroad Co. v. Huston*, 95 U. S. 687, it is said: "If, using her senses, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, the consequences of her mistake and temerity can not be cast upon the defendant." The judgment will be reversed and not remanded.

Judgment reversed.

SCHOOL DIRECTORS

V.

JAMES M. NEWMAN.

Schools—Teacher—Recovery of Wages—Incompetency—Illegal Contract.

1. A verdict for —— dollars is a nullity upon which a judgment can not be entered even for " —— dollars." A judgment in favor of a

School Directors v. Newman.

given person must represent the ultimate fixed and precise determination of the judicial proceeding in which it is entered.

2. In an action brought by a teacher to recover a balance claimed to be due him on account of salary, a wrongful discharge being alleged by him, this court holds, in view of the evidence, that at the time of the acceptance of the employment in question, the plaintiff had no certificate of qualification to teach for the term of the contract of service; that said contract was illegal, and that the judgment in his favor must be reversed.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of Washington County;
the Hon. GEORGE W. WALL, Judge, presiding.

MESSRS. WATTS & WATTS and CHARLES T. MOORE, for appellants.

MESSRS. BARTHEL & FARMER, for appellee.

MR. JUSTICE SAMPLE. The appellee was employed to teach the school of appellant for a period of six months at \$50 per month. After having taught the school a short time—more than three months—he was discharged for incompetency. The salary was paid to him monthly, and he had received \$150. Claiming that he was wrongfully discharged, he held himself in readiness to teach the full term, and not being allowed to do so, at its expiration, brought a suit before a justice of the peace to recover \$150, the balance claimed to be then due. Before the trial, the directors brought into court and tendered \$26.19 and accrued costs, which appellee declined to receive, and the cause was submitted to a jury, which returned a verdict in favor of appellee for _____ dollars, upon which the justice entered judgment for _____dollars.

Thereafter this suit was brought in the Circuit Court as an original action, and the foregoing facts as to the proceedings before the justice were set up in a special plea as a bar, to which the court sustained a demurrer, which is assigned for error. The demurrer to the plea was properly sustained.

The verdict for ——— dollars was a nullity upon which a judgment could not be entered even for ——— dollars. A judgment must represent the ultimate fixed and precise determination of the judicial proceeding in which it is entered. The suit was for the recovery of money. Neither the verdict nor judgment represented the conclusion of the law upon that issue. The other question involved in this appeal relates to the validity of the contract of employment of appellee.

The school district records show that he was employed on the 26th day of June, 1890, and by letter was notified on the same day of such employment, to which appellee replied by letter of date June 30th, to the directors, "Yes, I guess I will take the school." It appears from the evidence that appellee desired \$55 per month, but when notified by the letter of his employment and the salary, he was requested to answer soon, as if he did not accept a Mr. Cook would get the school. The directors relied upon the letter above as an acceptance, and did not take any other steps to employ a teacher. Appellee, in his letter to the directors, stated that he desired to commence the school by the first of September, or not later than the middle of that month. The directors desired it to open about the 15th of September, but afterward, at the request of appellee, postponed the opening until October 1st. This request was made and the time fixed definitely about the 1st of September, as appellee claims, at which time, he also claims, was the first time that he had accepted the employment. He did not have a certificate to teach until August 30, 1890, for the entire term of his contract. Appellants claim that the contract of employment was illegal under the statute, which requires that at such time he shall have a certificate of qualification entitling him to teach during the entire term of his contract (Par. 53, Chap. 122, Starr & C. Ill. Stats.); while appellee claims that he did not accept the employment and the contract was not complete until the time when it was definitely determined when the school was to begin.

We think it is clear that appellee accepted the employ-

Hartford Fire Ins. Co. v. Magee & Ettleson.

ment on the 30th day of June, by his letter above referred to, and that the postponement of the opening of the school from the 15th of September, the date he fixed in his letter, and the date that had been agreed upon by the directors, was at his request. He did not make the date of opening the school a condition of acceptance in his letter of June 30th. He merely expressed a preference as to the time, which agreed with the views of the directors, which was afterward changed for his benefit.

Appellee not having a certificate of qualification to teach at that time, as required by law, the contract of employment was illegal, and therefore can not be made the basis for recovery in this action.

The judgment is reversed without remanding.

HARTFORD FIRE INSURANCE COMPANY

V.

HUGH MAGEE AND HIRSH ETTLESON, COPARTNERS.

Fire Insurance—Fraudulent Representations—Incendiary Fire.

1. In an action brought to recover upon an insurance policy, this court finds, in view of the evidence, that a plaintiff named made fraudulent representations to the agent of defendant company as to the quantity and value of the property described in the policy, for the fraudulent purpose of obtaining excessive insurance; that such agent relied upon the truthfulness of such representations in ignorance of their falsity; that the policy thus became void and of no effect, and that the judgment against the company must be reversed.

2. This court likewise holds that such misrepresentations were not avoided by the fact that the company's agent saw the property in question. That the opportunity to ascertain the quantity and character thereof, not taken advantage of, did not purge or purify the misrepresentations, or nullify their legal effect.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of Richland County; the Hon. CARROLL C. BOGGS, Judge, presiding.

Messrs. DANIEL H. PADDOCK, R. B. WITCHER and JOHN LYNCH, JR., for appellant.

Messrs. R. S. ROWLAND and C. S. CONGER, for appellees.

MR. JUSTICE SAMPLE. The appellees insured 2,195 boxes of evaporated fruit, stored in a building at Noble, Illinois, for the sum of \$6,000 on the 19th day of November, 1891, which were destroyed by fire on the first day of December thereafter; suit was brought on the policy of insurance, and on trial before a jury, verdict was returned for the sum of \$2,325, which was sustained by the court, whereupon this appeal was taken, and the principal error assigned and discussed is, that the judgment is contrary to the evidence. The appellees started in the business of evaporating apples and other fruit at Noble on the 13th day of July, 1891, and closed down in the latter part of October. The fruit claimed to have been destroyed was stored during the latter month.

The defense interposed was that there were fraudulent representations as to the quantity of fruit in store, which, under the policy, renders it void; that the appellees, or one of them, caused or were knowing to the fire that destroyed the property, and that the verdict is excessive.

The building was unoccupied by any person, and was only used for the purpose of storing this fruit. There was no fire used in the building. It appears that no one had been in the building for several days previous to December first. That the fire was of incendiary origin is unquestionable.

The whole of the inside of the building, including the boxes, was wrapt in flames in a very few minutes, and in a short time the entire property was a smouldering ruin.

That the fruit was largely overinsured is conceded, or at least it is proven. While this fact may show an interest in the destruction of the property, it does not of itself prove

who set the fire. The most serious question in this case is as to the representations that were made by Magee, at the time of the application for insurance, as to the quantity of fruit in store, viz., 2,195 boxes, and as to its value, viz., \$8,780.

Appellees' counsel insist that the jury found that there were only 726 boxes of fruit in store in order to reach their verdict of \$2,325. At the very threshold of their case, then, we face this state of facts: That Magee represented that he had 2,195 boxes of fruit in store upon which he applied for insurance, whereas in fact, as found by the jury, he only had 726 boxes—an excess of 1,469 boxes, or, the actual number of boxes was a little less than one-third of the number represented to be in store; that he represented the value of such fruit to be \$8,780, over three times the actual value of the property.

We have diligently sought for an explanation, in the record, of these significant if not suspicious facts. The record does not clear up or solve the difficulty, but rather accentuates those facts, if only a tithe of what the witnesses say is true. Magee's statement of the loss of tags and tickets is not satisfactory. He claims to have had a partner, to whom he would necessarily have to account, and a most singular fact is, that he could not tell with a reasonable degree of definiteness, the amount of the product of his season's work, and what became of it. The books or other papers were not lost in the fire, so far as they appertain to the season's work.

The large excess in quantity and value of the property insured, demanded an accounting with some degree of accuracy.

The paring and coring machine registered 31,525 baskets of apples, each holding a bushel, as the total output of the season's work. It is proven that eight, nine or ten bushels of apples can be put in a box, depending upon the pressure in packing. If we take the intermediate number, nine, as the divisor, the 31,525 baskets, or bushels, will make about 3,503 boxes of apples. The books of the railroad company, at Noble, show that there were shipped, 3,454 boxes. The

books and tickets of appellees show that they purchased 29,774 bushels of apples.

It is proven that a bushel of apples will make from five to seven pounds of evaporated fruit. Taking the intermediate number, six, and we have 3,573 boxes, at fifty pounds to the box, or if we take the highest number, seven, we have 4,107 boxes. We have under the six-pound estimate 119 more boxes than were shipped, and under the seven-pound estimate 553 more boxes. It is true Magee says he lost a lot of tags from the baskets, and tickets of purchase of the apples, but how they come to be lost he does not explain.

As before stated, the mere declaration of loss, under the peculiar circumstances of this case, is not satisfactory. The analysis of the evidence as to the capacity of the storage rooms, and the amount of fruit put in, leads to unsatisfactory results. Magee says he estimated 1,008 boxes in the rear, and over 1,100 in the front room of the building, or to be exact, 1,187 in the front room, which makes the 2,195 boxes stated in the application. He states what he *thinks* was the capacity of the storage house. The husband of the owner of the building, who had measured it, states the dimensions accurately.

The rear room, inside measure, was $14\frac{1}{2} \times 9 \times 9$ feet.

The front room was $15 \times 23 \times 9$ feet.

The boxes, by measurement, were twenty-two inches long, twelve and a half wide, and twelve and a half in height, with the lid on. We will first consider the capacity of the rear room.

If the boxes were packed long way of the box and the long way of the room, there would only be seven boxes in length and a fraction over.

The ceiling being nine feet in height and the boxes being twelve and one-half inches high, only eight tiers could be put in. Even if the box was only twelve inches in height it is not probable that they could be packed so closely as to get in nine tiers. This would make $7 \times 8 = 56$ boxes in one row. Magee does not claim there were more than five rows. The

appellant claims there were only four rows. But assuming there were five rows and we have $5 \times 56 = 280$ boxes, whereas, as heretofore stated, he estimated there were 1008 boxes in the rear room. The front room had a greater capacity but it is conceded that it was but partly full. From the evidence of various witnesses it appears that there were not probably over three or four hundred boxes in that room. The evidence of apparently reliable business men who were disinterested, put the number at less than that above stated. In any event the estimate of the jury at 726 boxes was even more liberal to the appellees than we believe the evidence warrants.

It is almost inconceivable, that Magee, with his experience in packing, shipping and storing boxes of evaporated fruit, did not know whether there were 2,195 or 726, or even a less number of boxes of evaporated fruit in store, and whether that product was worth \$2,325 or \$8,780.

In addition to this suggestion, it is difficult to rid ourselves of the belief that he either kept some record of the storage, or had some ready means, as by the number of loads or sacks of fruit hauled from the evaporator, or the output of his evaporator, or wages paid for "facing," boxing, or some reasonable way of determining with a fair degree of accuracy, the number of boxes of fruit on hand. It appears from the evidence that he had had time to deliberate upon the matter after he had determined to insure, before the application was made. He doubtless had considered the amount of property there was in store. It is taxing human credulity beyond a reasonable limit, to try to make it appear that he did not absolutely know that there were not anything like 2,195 boxes of fruit in that storehouse, and that the estimate of that number of boxes, instead of 726 boxes, or near it, was a mere unintentional mistake, or error of judgment. It is sought to legally avoid the effect of the misrepresentations of Magee, by showing that the agent who took the insurance, saw the property. While this is true, it is clear that he relied upon the representations of Magee, as to the number of boxes of fruit in store.

There is nothing to show that he had had any experience

in estimating the quantity, or the number of boxes that could be stored in a certain space. He did not pretend to count the boxes, and did not in fact, go through the rear room of the building. He looked into some few boxes, and saw there was fruit in them, but he made no examination to determine the number of boxes. The mere fact that the agent saw the property, did not relieve Magee of the responsibility of telling the truth, so far as he knew it, unless the agent relied upon his own knowledge, or knew that Magee was not telling the truth, which is not pretended. Because the agent had the opportunity of examination, and could have determined for himself whether or not there were as many boxes in store as were claimed by Magee, and did not do so, but chose to rely only upon Magee's statement, did not relieve the misrepresentations of their wilful and intentional character. Such opportunity did not purge, or purify the misrepresentation, or nullify its legal effect. What was the purpose of the wilful misrepresentation of Magee, in his application? Without going into a detailed statement of the evidence that may be said to give character to that purpose, we are constrained to hold that the purpose was fraudulent. The case hinges upon this question, and we have, after careful consideration, determined that the evidence will warrant no other conclusion.

The fact will therefore be found and entered of record, and the case reversed without remanding.

Judgment reversed.

THOMAS E. MAYES AND L. C. PULLEN

V.

ROGERS, SCHWARTZ & Co.

Sales—Fruit Evaporators--Warranty—Breach—Rescission of Contract.

1. The right of return of goods sold and warranted exists where the contract is unexecuted, or there is a stipulation that the property may

Mayes v. Rogers, Schwartz & Co.

be returned if not found to be satisfactory, or the warranty was accompanied with fraud in the sale.

2. If property purchased is accepted by the vendee, then in the absence of fraud, it can not be returned. In such cases the contract of warranty exists during the life of the statute of limitations, and the remedy for a breach is upon it alone, and not upon the contract of sale.

3. The right to return property purchased with a warranty before acceptance, does not depend upon the contract of warranty, or the rescission of the contract in the absence of fraud, but upon the fact that the property is not of the kind or quality contracted for. Such being the case, the purchaser may return the property, if done within a reasonable time, but in so doing he does not rescind the contract.

4. The vendee may, notwithstanding such return, insist on the vendor complying with it, and on failure to do so may recover damages, or he may refuse to receive or accept other property after such return on the ground of the failure of the vendor to comply with his contract, if the contract itself does not reserve to the vendor such right of furnishing other property under the contract, and in compliance therewith. Until the vendor delivers the kind of property purchased, or the property delivered is accepted by the vendee, the contract of purchase remains executory, and the contract of warranty remains in abeyance; for, primarily, the warranty only becomes vitalized so that an action may be maintained upon it when the contract of sale becomes executed by an acceptance of the property, express or implied.

5. Receipt does not always amount to acceptance: it becomes so if the right of rejection is not exercised within a reasonable time.

6. This court holds as proper a refusal to allow defendants to show that they had tendered back the evaporators in question, in rescission of the contract involved before the present suit was instituted, no fraud being claimed, in view of the averments of the declaration that one of the appellants had, before suit, purchased the interest of the other.

[Opinion filed March 11, 1893.]

APPEAL from the Circuit Court of Marion County; the Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. SCHAEFFER & SONS, for appellants.

Messrs. H. C. GOODNOW and T. E. MERRITT, for appellees.

MR. JUSTICE SAMPLE. The appellants bought of the appellees two new process fruit evaporators, and obtained a warranty as to their capacity.

The case was submitted to a jury, which found for the appellees, and after a careful examination of the evidence, we are unable to say that finding should be set aside. It is clearly proven—a matter, however, of common observation and experience—that it takes time and experience to get the full results in the operations of such apparatus. There was much evidence introduced which tended to show that the evaporators, when properly operated, had the capacity stated in the warranty.

It is urged that the court committed reversible error in not permitting appellants to show that they had tendered back the evaporators in rescission of the contract, before their suit was instituted. It is not apparent what effect such ruling could have had on the result of the trial, in view of the fact that the jury found there was no breach of the contract. The ruling of the court, however, was correct in view of the averments of the declaration, which set forth that one of the plaintiffs had, before the suit was begun, purchased the interest of the other in the evaporators.

The law in this State is not as laid down in *Benjamin on Sales*, Sec. 888, where the case of *Sparling v. Marks*, 86 Ill. 125, is cited under note "A," as authority for classifying Illinois among those States which hold that the purchaser has a right to rescind the contract and return the goods purchased, in all cases of a breach of warranty, expressed or implied. That case does not justify such classification. In the first place, the facts in that case show, first, that there was gross fraud practiced in representing a crystal, which was worth only a few dollars, to be a diamond for which the purchaser agreed to pay \$100, which of itself would justify the rescission of the contract; second, the title to the property—the finger ring—had not passed to the purchaser, as the crystal, together with the ring of the purchaser, was placed by agreement of the parties in the hands of a third party in pledge, or as security for the payment of the \$100, and hence the contract was not an executed one.

The right of return of goods is summarized in the case of *Owens v. Sturges*, 67 Ill. 36, in this language: "First, where the contract is unexecuted; or, second, there is a stipulation that the property may be returned if not found to be satisfactory; or, third, if the warranty be accompanied with fraud in the sale." This case lays down the true doctrine. We know it is often said, the remedy of the purchaser of property with a warranty is to either return the property, or retain it and recover damages on the contract of warranty, in case of a breach. That statement of the law is relatively, but not strictly, correct, if made without limitation of time or circumstances. If the property purchased is *accepted* by the vendee, then *in the absence of fraud* it can not be returned; for after acceptance, the contract of sale is *executed*, and in such case it is illogical to assert that such a contract can be rescinded. After the execution of the contract of sale it ceases to exist as a contract, and therefore there is nothing for a rescission to operate upon. In such case, however, the contract of warranty exists during the life of the statute of limitations, and the remedy for a breach is upon it alone, and not upon the contract of sale. The right to return property purchased with a warranty before acceptance does not depend upon the contract of warranty or the rescission of the contract, in the absence of fraud, but upon the fact that the property is not of the kind or quality contracted for. If the property delivered is not of the kind contracted for, then the *real* contract has never become operative, and the purchaser in such case may return the property, if done within a reasonable time, on that ground. In so doing he does not rescind the contract. He may, notwithstanding such return, insist on the vendor complying with it, and on failure to do so, may recover damages, or on the other hand, he may refuse to receive or accept other property after such return, on the ground of the failure of the vendor to comply with his contract, if the contract itself does not reserve to the vendor such right of furnishing other property under the contract and in compliance therewith. Until the vendor delivers the kind of property pur-

chased, or the property delivered is accepted by the vendee, the contract of purchase remains executory, and the contract of warranty remains in abeyance; for, primarily, the warranty only becomes vitalized so that an action may be maintained upon it, when the contract of sale becomes executed; that is, when there is an acceptance of the property, express or implied, by the vendee.

What constitutes an acceptance, is sometimes difficult to determine. The buyer is not precluded from objecting to property, merely because he has received it, for receipt is one thing, and acceptance is another. But receipt will become acceptance, if the right of rejection is not exercised within a reasonable time (Benjamin on Sales, Sec. 703), or, as said in the case of *Underwood v. Wolf*, 131 Ill. 436, if he has exercised acts of ownership, as by offering to re-sell the property, or has retained it for a longer time than was reasonable for a trial, or for testing it, which facts show an agreement of acceptance. Applying the rules of law here laid down, and it is clear that under the pleadings, the appellants had no right to show an offer to return the property, no fraud being claimed. The judgment is affirmed.

Judgment affirmed.

THE CITY OF BELLEVILLE

V.

MARIA STAUDER.

Dram Shops—Ordinances—Appeal—Certiorari—Practice.

1. The motion to quash the writ of *certiorari*, and the ruling thereon, not being presented by a bill of exceptions in the case presented, this court is precluded from considering the assignment of errors thereon.

2. This court is likewise precluded from considering the other errors assigned, for the reason that the record does not show that the pretended ordinance offered in evidence prohibiting the sale of intoxicating liquors, was ever passed or published.

[Opinion filed March 11, 1893.]

City of Belleville v. Stauder.

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

MESSRS. AUGUST BARTHEL, City Attorney, and BARTHEL & FARMER, for appellant.

MR. WILLIAM WINKELMANN, for appellee.

MR. JUSTICE SAMPLE. The city obtained a judgment before a justice of the peace for \$200 against appellee for the violation of an alleged ordinance, prohibiting the sale of intoxicating liquor, from which judgment appellee prayed an appeal, which appeal was not perfected within the time prescribed by law, but was thereafter obtained by *certiorari* under the statute, on petition granted by the master in chancery, in the absence of the judge of the Circuit Court. On the opening of court the city, by its attorney, moved the court to quash the writ and dismiss the *certiorari* proceedings, which motion was overruled, but no exceptions were taken thereto. Neither was the motion to quash nor the ruling thereon incorporated and preserved in a bill of exceptions.

The case proceeded to trial before a jury which found for the appellee, and judgment thereon was entered after motion for new trial was overruled.

The errors assigned and argued relate to the action of the court in overruling the motion to quash the writ, in giving and refusing certain instructions, and in overruling the motion for a new trial. The record is so imperfect that we can not enter into the merits of this case.

The motion to quash the writ of *certiorari* and the ruling thereon not being preserved by a bill of exceptions, we are precluded from considering the assignment of error thereon. *Thompson v. White*, 64 Ill. 314.

We can not consider the other errors assigned for the reason that this record does not show that the pretended ordinance offered in evidence, prohibiting the sale of intoxicating liquor, was either ever passed or published. Therefore,

although we do not agree with the court below as to the law as laid down in some of the instructions given for the appellee, yet as there was no ordinance violated, so far as shown by this record, no injury resulted therefrom to appellant.

The judgment is affirmed.

Judgment affirmed.

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GEORGE HOTZ, SHERIFF, FOR USE, ETC.,
V.
BOLLMAN BROS. CO., AND CHARLES A. CALDWELL.

Replevin—Action on Bond—Statute of 1845—Amendment of 1879.

1. When false or meaningless phrases in a contract can be rejected, and yet the body of the contract stand, it is not only lawful but proper to reject them.

2. The rule of construction of all contracts of voluntary obligation, whether as to sureties or principals, is to apply that meaning and to give that interpretation to the words used, in the light of the whole instrument, together with any sidelight in case of ambiguity, as will carry out the evident intent and purpose of the parties thereto. When the construction of the contract is thus adopted, and its meaning determined, then the rule of *strictissimi juris* applies as to sureties on such contract.

3. Statutory bonds taken by court officers will be liberally construed. Courts will look to the meaning of the parties as collected from the instrument itself, and when the meaning is evident, will reject or transpose insensible words and supply accidental omissions in the way of mere recital.

4. If a replevin bond as given, gives a right of action, although it does not contain all the provisions required by a certain statute, the signers thereof can not, when sued upon it, interpose the defense that it does not provide for another cause of action. It can not be said to be void if good at common law.

5. The omission in the bond is as to the payment of costs and damages for wrongfully suing out the replevin writ; such condition is separate and distinct from the condition embodied in the bond sued on. An action will lie for a breach of either, as each condition is an independent obligation, and a failure to keep either is a ground of action.

Hotz v. Bollman Bros. Co.

6. The affidavit, writ and bond in a replevin suit, are a part of the same proceeding; and for the purpose of determining the identity of the bond, the date of suing out the writ and the court out of which it was sued, may be considered together—not for the purpose of supplying essential omissions in the bond, but to correct unessential recitals made for the sole purpose of identification of the bond with the suit.

7. In an action brought upon a replevin bond the same being inaccurate in certain particulars, the declaration pretending to correct such inaccuracies, a general and special demurrer being sustained thereto, this court holds said action to have been erroneous and reverses the judgment for the defendants and remands the cause.

[Opinion filed March 17, 1893.]

APPEAL from the Circuit Court of Madison County; the Hon. B. R. BURROUGHS, Judge, presiding.

MESSRS. DALE, BRADSHAW & TERRY, for appellant.

MESSRS. CYRUS L. COOK, WILLIAM C. JONES and JAMES C. JONES, for appellees.

MR. JUSTICE SAMPLE. This suit was brought by appellant, sheriff of Madison County, for use of John Tuscher on a replevin bond.

The declaration in effect avers that the appellees replevied a piano from the Wabash Railroad Co., which is averred to have been the property of Tuscher, and gave the bond in suit, and after obtaining the possession of the property, dismissed the suit when judgment for costs was entered up against them, with an order for a return of the property. The replevin suit was begun in *Madison* County Circuit Court on the 23^d day of June, 1891, whereas the replevin bond given to the sheriff recited that the writ of replevin was “sued out of the ——— Court of St. Clair County, aforesaid, on the 22^d day of June, 1891.” The obligatory part of the condition of the bond recited: “Now if the said Bollman Bros. Company, plaintiff, shall prosecute its suit to effect and without delay, and make return of the said property, if return thereof shall be awarded, and save and keep

harmless the said sheriff in replevying the said property, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals, this 22d day of June, 1891."

The conditions of the above bond were those required by the Revised Statutes of 1845, but by an amendment thereto in 1879, the following was added: "And further conditioned for the payments of all costs and damages occasioned by wrongfully suing out said writ of replevin."

The declaration noted said errors as to the date of suing out the writ, and the court from which it was sued out, as follows: "And the plaintiff alleges that in said writing obligatory it is set forth that said Bollman Bros. Company had on the 22d day of June, A. D. 1891, sued out of the ——— Court of *St. Clair County* a writ of replevin, which said ——— Court of *St. Clair County*, plaintiff alleges, was intended and meant by the parties for the Circuit Court of *Madison County* aforesaid, and the date of said suing erroneously written 22d instead of 23d of June, the true date of such suing out," etc.

A general and special demurrer was filed to the declaration and sustained by the court, and, the plaintiff electing to stand by his declaration, his suit was dismissed with costs, etc.

The only error assigned is upon the ruling of the court. No technical point is made as against the declaration.

The position of appellee is that the errors of the bond can not be cured by averments or proof. The demurrer admits as a fact that the writ was sued out of the Circuit Court of *Madison County* on the 23d day of June, 1891, and executed by the sheriff of said county, to whom the replevin bond was given, and that such facts will appear on the face of such papers; that by virtue of such writ and bond the defendants got possession of said property, which belongs to Tuscher, and, notwithstanding the judgment of the court, refuse to return the same to him or the sheriff for his benefit. The affidavit, writ and bond are a part of the same proceeding; and for the purpose of determining

the identity of the bond, the date of suing out the writ and the court out of which it was sued may be considered together—not for the purpose of supplying essential omissions in the bond, but to correct unessential recitals made for the sole purpose of identification of the bond with the suit.

The part of the bond which recites the date of suing out the writ of replevin, and the court out of which it was sued, is not the statutory part of the bond. The statute does not require such recitals. Even if it did, and the whole proceedings taken together and considered as one should show the correct date, and the proper court, then such other papers would be resorted to for the purpose of identification.

If such recitals were left blank, the obligatory part of the bond could stand and extraneous proof would have to be resorted to in order to identify the bond with the suit in which it was given.

The error committed in reciting the wrong date of the commencement of the replevin suit is immaterial, as has been held in the case of *Graves v. Shoefelt*, 60 Ill. 462–4. In that case it was recited in the replevin bond that the writ was sued out “on or about the 3d day of August,” whereas the record showed that it was on the 20th day of August. The court held that this variance was immaterial. The suit and the property replevied were sufficiently described to give the obligee a complete remedy upon the bond.

The other erroneous recital “of the ——— Court of St. Clair County aforesaid” is on its face a false recital. The other recitals show this fact. It is so incongruous when considered in connection with the whole bond and the averments of facts in the declaration that it is utterly meaningless; when such false or meaningless phrases in a contract can be rejected and yet the body of the contract stand, it is not only lawful but proper to do so.

This rule has long since crystallized into a maxim of law which subserves the ends of justice in the enforcement of contracts according to the plain intent of parties to them,

instead of their invalidation. *Coons v. The People*, 76 Ill. 383. The rule of construction of all contracts of voluntary obligation, whether as to sureties or principals, is to apply that meaning and give that interpretation to the words used, in the light of the whole instrument, together with any side light, in case of ambiguity, as will carry out the evident intent and purpose of the parties thereto; when the construction of the contract is thus adopted, and its meaning determined, then the rule of *strictissimi juris* applies as to sureties on such contract, and not till then.

Statutory bonds taken by court officers will be liberally construed. Courts will look to the meaning of the parties as collected from the instrument itself, and, when the meaning is evident, will reject or transpose insensible words, and supply accidental omissions in the way of mere recital. See 2 Am. & Eng. Encyclopedia of Law, 260, Sec. 10, and authorities there cited; *Hibbard v. McKindley*, 28 Ill. 240; *Schill v. Reisdorf*, 88 Ill. 411. A bond in replevin will be liberally construed for the purpose for which it was given. *Cobbey on Replevin*, Sec. 1282.

It is also contended that the bond is invalid because it does not contain all the provisions required by the amendatory act of 1879. If the bond as it is gives a right of action, then the signers can not, when sued upon it, interpose the defense that it does not provide for another cause of action. They got the property on the faith of their obligation, and they can not now be heard to say it is void if it is good at common law. *Cobbey on Replevin*, Sec. 1287. The omission in this bond is as to the payment of the costs and damages for wrongfully suing out the writ. That condition is separate and distinct from the conditions embodied in the bond sued on. An action will lie for a breach of either, as each condition is an independent obligation, and a failure to keep either one is a ground of action. *Cobbey on Replevin*, Sec. 671; *Vinyard v. Barnes*, 124 Ill. 346. It was error to sustain the demurrer, and the judgment will be reversed and the cause remanded.

Reversed and remanded.

O. & M. Ry. Co. v. Schmidt.

OHIO & MISSISSIPPI RAILWAY COMPANY

V.

JOHN SCHMIDT ET AL.

SAME

V.

THOMAS T. RAIMEY.

SAME

V.

HUGH WILSON.

Railroads—Flooding of crops—Embankments.

In actions brought to recover from a railroad company for injury to growing crops through flooding, the court holds as erroneous the rejection of certain expert evidence offered by the defendant, and that the judgments against it can not stand.

[Opinion filed March 13, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

MESSRS. POLLARD & WERNER, for appellant.

MESSRS. JAMES M. HAY and CHARLES P. KNISPEN, for appellees.

MR. JUSTICE PHILLIPS. The same questions of law and fact are involved in these three cases, they only differing as to amount of damage. The questions involved are precisely similar to those determined by the Supreme Court of this State in O. & M. Ry. Co. v. Webb, 142 Ill. 404. In each of these cases expert evidence was offered by the defendant for the purpose of showing that the deposits which had formed between the Ohio & Mississippi and Vandalia Rail-

roads were not caused by the filling up of the trestle, and that they would have formed in the same manner if the trestle had been left open. Objection was made to this evidence in each of these three cases, and objection sustained by the court. In O. & M. Ry. Co. v. Webb, administrator, the court held that that evidence should have been admitted, and its rejection was error, for which the judgment in that case was reversed. The rejection of this expert evidence in these three cases was error, and each must be reversed and the cause remanded.

Reversed and remanded.

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LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED
RAILROAD COMPANY

v.

WILLIAM LEE.

Railroads—Negligence—Injury to Horses—Unlawful Rate of Speed—Signals—Evidence—Instructions—Par. 68, Chap. 114, Starr & C. Ill. Stats.

Par. 68, Chap. 114, Starr & C. Ill. Stats., touching signals, is applicable only to cases where persons are approaching and about to pass over a highway crossing, and not to persons upon roadways parallel with the railroad line, not intending to cross the same.

[Opinion filed March 17, 1893.]

APPEAL from the Circuit Court of Jefferson County; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

Mr. C. H. PATTON, for appellant.

Mr. W. H. GREEN, for appellee.

MR. JUSTICE SAMPLE. The appellee's team of horses were injured in a collision with appellant's engine.

The declaration contains four counts, which base the cause

of action upon the negligence of the appellant in running its train through the city of Mt. Vernon at an unlawful rate of speed, and in failing to ring a bell or sound a whistle before reaching public crossings, as required by law. The evidence shows that appellant's road is laid in Park avenue, a street in said city along which also is a public thoroughfare, intersecting with which is Casey avenue, near the place where the accident occurred; that on the 21st day of April, 1892, the appellee was driving his team, hitched to the running gears of a wagon, south along said avenue, in order to go to Plummer's lumber yard for a load of lumber; that as he got to or near Casey avenue the passenger train of appellants, going north, came onto Park avenue on a curve in the track about a block south of Casey avenue. There is much evidence to show, and we can not say the jury were not justified in finding, that the train was running at a high rate of speed, in excess, at least, of ten miles an hour, without ringing a bell or sounding a whistle. The appellee's team became so frightened as soon as the train was seen, about 250 yards away, that appellee got off the wagon, caught the team by the bridles and attempted to hold them, but they turned toward and got upon the track just ahead of the engine, were struck by it and so crippled by the collision that they had to be killed. It further appears from the evidence that this team was used to trains and had never been frightened at them before.

It further appears that Park avenue was in as good condition as any street in the city for public travel, having been filled with cinders, and that the route appellee was taking to reach his destination was a proper one, although he might have taken another which would not have brought him so near the railroad. In view of these facts we do not find that appellee was negligent in taking the route he did, or in the management of his team. The difficulty in this case does not arise in regard to the facts, but as to the law as applicable to those facts, as embodied in the first instruction given for appellee. The part of the instruction that raises the legal question is as follows:

“The plaintiff seeks to recover on the grounds, first, that the statutory signals for crossings were not given; second, that the train was running at a greater rate of speed than allowed by the city ordinance of Mt. Vernon. To recover on the first ground plaintiff must show by a preponderance of the evidence that the statutory signals were not given and that the failure to give such signals caused the injury.”

Another instruction given for the appellee told the jury that it was the duty of appellant to sound the whistle or ring the bell at least eighty rods before reaching any street crossing, and keep the same ringing or whistling until such crossing was reached. The legal question involved is, was the appellant under the *statutory duty to appellee* to ring the bell or sound the whistle? The evidence shows that appellee was passing along a street parallel with the railroad track, with no purpose or intention of crossing the railroad track at any point. He was not approaching any crossing with a view of passing over the same. In the case of *Williams v. The C. & A. R. R. Co.*, 32 Ill. App. 339, 342, it is said, in construing Par. 68, Chap. 114, Starr & C. Ill. Stats., 1935, which requires the ringing of a bell or sounding a whistle, that “the plain manifest object was to protect by a required warning those who might be about to cross the railroad over the highway, so that the danger of a collision at such crossings might be obviated.”

While the facts in the above case involved the question of such statutory duty as to one in a field adjoining the railroad, but within eighty rods of a highway crossing, yet from the language of the foregoing opinion and the authorities cited in support of the conclusion reached, it would appear to include within its scope all cases where the person injured, in person or property, was not intending to pass over a railroad crossing.

The same case is reported in 135 Ill. 491. On page 496 the court say: “It is a fair construction of Section 68, as above quoted, that the duty then imposed upon railroad companies was intended for the benefit of travelers upon the public highway. If it were not so, why is the bell required to be

rung or the whistle sounded at a certain distance from 'the place where the railroad crosses or intersects a public highway?' The place here indicated is the intersection of a railroad with a public highway, and the persons whose safety and protection are contemplated by this phraseology are those who use the highway and those who are passengers upon the passing train." The only cases, so far as our research could discover, that hold such duty is imposed for the benefit of travelers on parallel highways within the prescribed distance, are Wakefield v. Conn., etc. R. R. Co., 37, Vt. 330, and Ransom v. C. St. P. M. & O. Ry Co., 62 Wis. 178. The general current of authority as shown by the citations in the 135th Ill. at page 497, is to the contrary, which is thought to be supported by the better reason, when the purpose of such statute is considered. The preceding section to that requiring the signals, is closely related to the one that imposes such obligation. It provides that outside of cities or incorporated towns or villages, and in those where required by the corporate authorities, "Every railroad corporation shall cause boards, well supported by posts or otherwise, to be placed and constantly maintained upon each public road or street, where the same is crossed by its railroad on the same level. Said boards shall be elevated so as not to obstruct the travel, and to be easily seen by travelers. On each side of said boards shall be painted in capital letters of at least the size of nine inches each, the words 'Railroad Crossing' or 'Look Out for the Cars.'" This requirement being immediately followed with the imposition of the duty as to signals, clearly shows, in our judgment, that the protection designed by the legislature related to those who were approaching and about to pass over *highway* crossings.

If the legislature intended to protect a traveler passing along a parallel highway, who did not intend to cross the railroad track, why should such protection be limited to the distance within eighty rods of a highway crossing? Such signals would be of no more benefit to the traveler within such distance than at any other point on the highway. If such signals were considered a protection to him and essen-

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tial to his safety within such distance, is it not reasonable to suppose that the legislature would have extended the benefit along the whole line of a railroad where it was paralleled by a highway? The statute makes no distinction between public crossings in a city and outside, as to the duty to ring a bell or sound a whistle. Hence the Williams case, *supra*, would seem to control this case. The judgment will be reversed and the cause remanded.

Reversed and remanded.

CITIZENS' HORSE RAILWAY COMPANY

V.

CITY OF BELLEVILLE.

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Horse Railways—Use of Streets—Ordinances—Repeal of—For Non-Conformity with Conditions—Franchise—Forfeiture of—Quo Warranto—Chap. 112, Ill. Stats.

1. In the absence of constitutional limitations the legislature of a given State has the power to authorize, at pleasure, the use of streets for railroad purposes.

2. In view of statutes named, this court holds that the city in question had the legal right and authority to impose such terms and conditions upon the street railway company referred to as it deemed best for the interest of the public, and that although a given court has the power to determine whether such terms and conditions and the mode of their enforcement contravene established principles of law, subject to which rule the exercise of all subordinate authority exists, beyond that, the court can not go.

3. The words "due process of law" as set forth in the principle providing that no person shall otherwise be deprived of his property, have reference to judicial proceedings according to the course and usage of the common law.

4. The right and privilege to construct and operate a horse railroad in the streets of a city for the purpose of carrying passengers for hire is property, if such road is constructed and completed in accordance with the terms imposed.

5. The power exists in a municipality to impose terms upon such corporation as to the time and character of the road to be constructed, upon the fulfillment of which depend the maturing of the grant, and while

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such conditions are being fulfilled within the time prescribed, if there is a limit the grant remains inchoate, and they are termed conditions precedent; while those terms imposed that affect the manner of operating the road and its state of repair after its proper construction, are conditions subsequent; in which case such a grant becomes vested property with all the rights attached that secure tangible property. In the case presented, the conditions imposed, which it is claimed have been violated, were conditions subsequent, and the grant had vested as property and could only be divested by due process of law.

6. While an ordinance, when accepted by a street railway company, becomes a contract subject to revocation at the will of the city—such right being reserved—while the contract remains executory, after such time, even if the ordinance is considered merely as a contract, it then becomes an executed contract ripened into a perfected grant—vested property—notwithstanding the terms imposed therein, upon which as vested property the subsequent conditions continue to operate under the law as applicable to such conditions, and it is not left to one of the parties to the original contract to enter judgment of forfeiture of the property of the other party to the contract and thereby divest him of his rights. It is a question of fact whether the cause of forfeiture exists; and the determination of that question would be for the courts and not the city to decide. There would have to be a legal investigation where both parties could be heard, and a judicial determination upon the facts so developed, such being “due process of law.”

7. The effect of the forfeiture claimed in the case presented, is to render the charter of defendant corporation and its franchise inoperative—tantamount to an ouster from the franchise, viz., the right to “operate a horse railway in the streets” of the city named, the rights and privileges granted by said city being a vital part of the franchise.

8. A municipality does not stand in the same relation to such a charter and franchise merely because it has control of the streets, that an individual does who owns lands within the line of the right of way of an ordinarily incorporated railroad company. In the latter case the charter is complete when granted by the State and carries with it, under the law of eminent domain, the power to execute, with or without consent of such owner of land, the franchise. In the former case the municipality is related to the State as its agent, invested with constitutional rights as well as delegated power, in regard to the right to operate in the streets horse railways, without whose action, and by incorporating its consent in the charter granted by the State, the franchise is a nullity.

9. Since the Constitution of 1870, the right to create and perfect such a franchise as is involved in the case presented, rests both in the State and the municipality, and the consent of the latter when granted is a part of the franchise; and the fact that the ordinance, when accepted by the company, created a contract between the parties does not affect this view. The charter of defendant is in a sense just as much a contract with the State as is the ordinance with the municipality. The contract feature, however, is limited to those provisions of the charter or ordi-

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nance relating to the dealings between the incorporated company and the State or municipality as such, and does not extend to those provisions relating to the dealing of such incorporated company with the public.

10. The franchise of the defendant company being sought to be involved in the proceeding herein, the attempt to enforce a forfeiture should have been in a direct proceeding by *quo warranto* under Chap. 112, Ill. Stats.

11. While this court would not have jurisdiction to consider an appeal which involved a franchise, that is, where its judgment would result in sustaining or ousting a franchise, it has jurisdiction to determine whether or not proceedings instituted were such as could legally involve a franchise.

12. This court holds that a certain paper filed herein by complainant, called a petition, the same being in the nature of an affidavit in support of a motion to the court in charge through its receiver in foreclosure proceedings, to release from its control and custody the property of the defendant, in order that the former might remove the tracks, etc., of the defendant from its streets, should, in view of its contents, be stricken from the files of the case presented.

[Opinion filed March 17, 1893.]

APPEAL from the Circuit Court of St. Clair County; the
Hon. A. S. WILDERMAN, Judge, presiding.

The appellant was granted the right and privilege of laying its tracks and operating its road along certain streets in the city of Belleville, under and by virtue of an ordinance passed December 31, 1885.

Section 1 granted the right and named the route.

Section 2 required the company to pay owners of abutting property damages, if any, by reason of the construction of the road.

Section 3 provided that the rights granted to the company were subject to the right of the city to use, improve and repair the streets, "and to make all necessary police regulations concerning the management and operation of said railroad."

Section 4 provided that the streets should not be obstructed longer than was necessary, and that the road must be constructed and operated within a certain time.

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Section 5 required the company to keep the street in repair between the rails of its track.

Section 6 provided that all rights theretofore granted to the Belleville Railway Company should be granted and renewed to the appellant as its successor.

Section 7 regulated the passenger fare.

Section 8 provided that "upon the failure of said company to comply with any condition herein named the said council shall have the power, which it hereby expressly reserves, to repeal the ordinance and revoke the consent hereby given." It also provides that the right herein granted shall be forfeited as to such portion of the streets as are not used within two years.

Section 9. "If said company shall fail to operate the said horse railroad regularly for a period of thirty days, or fail to run a car over said road, to pass a given point, at least every fifteen minutes at regular intervals in the daytime, unless said failure is caused by accident to its property in said city, or its route therein, the rights and privileges hereby granted shall at once cease and determine, and unless said company, within sixty days thereafter, shall remove its tracks, turn-outs and switches from the streets then occupied by said railroad, and put said streets in good repair, the said tracks, turn-outs and switches shall be forfeited to said city."

Another ordinance, passed October 4, 1886, required that the company should run its cars where its track passed any railroad depot so as to make connection with passenger trains.

Another ordinance, passed July 21, 1890, required that the company should run a car east from its west terminus at half past nine and half past ten o'clock every night and from its east terminus at ten and eleven o'clock every night.

The appellant, on the 7th day of October, 1886, made and executed its trust deed to J. D. Percy and L. G. McNair on all its property, privileges, etc., to secure \$25,000 of bonds issued by the company for the construction and equipment of its road, which drew six per cent interest, payable semi-

annually. No interest having been paid on the bonds, the trustees, on the 11th day of September, 1891, filed a bill in the Circuit Court of St. Clair County to foreclose said trust deed, declaring the whole debt due under the promise of the trust deed, averring the insolvency of the company, making the appellant John Thomas, who was alleged to be the sole owner of the bonds and coupons, and the city of Belleville, parties defendant — the latter on the ground that it had and was threatening to tear up and destroy the track of the company — prayed for a strict foreclosure, the appointment of a receiver, and asked for a writ of injunction to restrain the city of Belleville from executing its threats.

A temporary injunction was granted, and John Thomas was appointed receiver on the 21st of September, 1891, who took possession of and operated the road. Thomas soon resigned and Ryder was thereafter appointed, who continued to operate the road. Prior to the filing of the bill it appears that complaint was made by the city that the company was not keeping the track in repair, and therefore on the 18th of June, 1891, the president of the company was served with written notice to repair at once the track along Main, Illinois and Charles streets. At a meeting of the council on the 8th of September, 1891, it was ordered that the officers of the company be served with notice to appear at a council meeting to be held September 21st, to show cause why the ordinance granting the company the right to lay its tracks and operate its road should not be repealed. Notice was served on the company on the 10th of September. At the meeting on September 21, 1891, an ordinance was offered, repealing all ordinances relating to the rights and privileges granted to the appellant, but the consideration of the same was postponed until a meeting of the council on the 4th day of January, 1892, when it was taken up and passed, at which time, as heretofore stated, the road was in the hands of the receiver.

Notice of the passage of such ordinance was served on Thomas and Atterberg, who had bought all of Thomas' interest in the bonds and became the sole owner, and also one

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Ryder, who was the receiver of the road. The repealing ordinance, after referring to and reciting those portions of the ordinances heretofore mentioned—granting rights and privileges to the company and imposing certain duties, and the power reserved of repealing the same—provides as follows: "Inasmuch, therefore, as the Citizens' Horse Railway Company did not reasonably comply with the duties and obligations imposed by sections 5 and 9 of said ordinance No. 185, nor with the duties and obligations imposed by ordinances Nos. 275, 201, 446 and 171, therefore be it ordained by the City Council of the City of Belleville, Illinois:

Section 1. That ordinances Nos. 446, 185, 171, 201 and 275, and all ordinances in relation to the Citizens' Horse Railway Company, except ordinance 287, be, and the same are hereby repealed, and all the rights and privileges by said ordinances granted are hereby revoked.

Section 2. That the city clerk be instructed to notify the said Citizens' Horse Railway Company to remove its tracks, switches and turn-outs from the streets of the city of Belleville within sixty days after the passage of this ordinance.

Section 3. That if said tracks, switches and turn-outs be not removed within sixty days after the passage of this ordinance, and such notice shall have been given as is provided in section 2 of this ordinance, that the same are hereby declared forfeited to the city of Belleville, and the street inspector be instructed to remove the same."

On the 16th of March, 1892, the city of Belleville filed its petition, averring that the company had not complied with the ordinance of the city, wherefore it had passed the repealing ordinance above noted, which had not been observed by the company, and concluded with the following prayer: "In consideration of the premises, your petitioner asks leave of the honorable court to remove the tracks, turn-outs, switches, etc., of the said Citizens' Horse Railway Company on said street railway from the streets of said city of Belleville."

This petition was filed in said foreclosure case, but as an independent proceeding, making no one a party defendant.

A motion made by the complainant in the foreclosure proceeding to strike the petition from the files was overruled by the court.

On the 31st of March, 1892, the city of Belleville filed its answer to the original bill, denying all the material allegations of the bill, except that part charging that it threatened and intended to tear up and remove the track of the company, which it averred and affirmed its right to do, under and by virtue of its ordinances.

The company and trustees answered the petition of the city of Belleville, denying the facts in it stated, and also the right of the city to repeal said ordinance and remove its tracks, or averring that its remedy, if any, was at law. The answer also averred that it was contemplated to change the motive power and put in an electric line, and repair and renew the old line; that if that was not permitted, then that the Citizens' Horse Railway Company, or those interested in it, were ready and willing to comply with every condition contained in ordinances under which said road is now being operated; that the earnings of the Citizens' Horse Railway are not sufficient to make repairs on said road, but if the court required it the Citizens' Horse Railway Company is ready and willing to give a good and sufficient bond, to be approved by the court, in such an amount as it might determine, conditioned for the faithful performance of all its conditions and obligations contained in said ordinances, and to improve, repair and keep in constant repair the said road, tracks, cars, etc.

The trustees and the railway company, after the cause was at issue, moved the court to refer the whole matter to the master to state the amount of indebtedness, and also to take evidence on the petition and to report the same to the court, which motion was overruled, whereupon the same parties moved that a jury be called to try the issue on the petition, which motion was also overruled.

The court heard the evidence on the petition and also on the issue, as to the foreclosure of the trust deed, and entered its decree.

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The evidence taken on the petition covered the whole period of time substantially up to the time of the taking of the evidence.

There was no proof to show that the road had not been operated for any considerable period of time, on any part of its line, before the road was placed in the hands of a receiver by the order of the court.

There was evidence, however, from which it might fairly be found that the track of the road and the street between the rails were not kept in such condition as the ordinances required, and also that at various times cars did not pass a given point every fifteen minutes, and that the service was bad before the road was operated by the receiver. The findings of the court were, in substance, as follows:

First. That the Citizens' Horse Railway Company had for a long time failed to operate its road as required by the ordinances; the council had cited it to show cause why its privilege should not be revoked; that said repealing ordinance was passed as alleged, and that the company had failed to remove its tracks, etc.; that said trust deed was a valid lien on all the property, rights, etc., of the railway company; that the trustees were entitled to a decree of foreclosure for the entire debt, which was found to be \$32,250, all of which debt is owned by George Atterberg; that the company is insolvent and the property not of the value of the debt, and that the property would be taken for the debt and the debt discharged, and that no benefit would arise from a sale being made. From which finding the court decreed, first, that the Citizens' Horse Railway Company take up and remove its tracks from the streets of the city of Belleville, within sixty days from May 2, 1892, and on failure to do so the city is authorized and empowered to remove such tracks, etc.

Second. It is decreed that the receiver pay certain expenses made by him out of funds in his hands, or that may come to his hands, which are declared a prior lien to the bonded indebtedness.

Third. That the company pay George Atterberg, the sole owner of the bonds, \$32,250 within three months

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from the date of the decree, and certain other small amounts to other parties, whereupon, if paid, the trustees are to reconvey the property to the company, but on default, the company to be forever barred and George Atterberg to get the title to and possession of the road from any one in possession thereof on the production of a certified copy of this decree under penalty of contempt for any one failing to comply, and the company to make him a deed of conveyance for "each and all of its property, both real and personal, powers, rights and privileges and franchises hereinbefore described as belonging to said company."

The trustees and the Citizens' Horse Railway Company separately prayed an appeal as to the decree in the petition of the city of Belleville and assign the following errors:

Assignment of Errors.

First. The Circuit Court erred in deciding that the city could, before any judicial examination or adjudication that the railway company had violated any of the rights, powers, privileges and franchises granted it by the ordinances of said city to operate its railway — pass an ordinance revoking such rights, powers, privileges and franchises, and forfeiting the property of said railway company to said city.

Second. The Circuit Court erred in decreeing a forfeiture against the railway company in this proceeding, and in not striking the petition of the city from the files.

Third. The Circuit Court erred in finding and decreeing a forfeiture against the Citizens' Horse Railway Company on the evidence in the record.

Fourth. The Circuit Court erred in deciding that there was any evidence to authorize a forfeiture under the grounds specifically declared as authorizing a forfeiture by ordinance No. 185.

Fifth. The Circuit Court erred in improperly admitting all the evidence as to the condition of the roadbed and tracks after September 22, 1891, the date when the receiver took possession of the railway.

Sixth. The Circuit Court erred in denying the motion to impanel a jury to hear and determine all the questions of

fact raised on the petition filed by the city, and in refusing to refer said petition, as well as the original suit, to the master in chancery, to take and report all evidence offered by either party to the court before final hearing.

Seventh. The Circuit Court erred in decreeing a forfeiture without the railway company or the owner of the mortgage bonds being made parties to the petition filed by the city.

Eighth. The Circuit Court erred in holding that the city attorney had any power or authority from the city council to file the petition on which a forfeiture was declared.

Messrs. HAMILL & BORDERS, for appellant.

A forfeiture is never favored or implied, consequently any pleading setting forth grounds for forfeiture must be specific, and the allegations thereof must be proved conclusively. Waite on Insolvent Corporations, Sec. 124.

While this is not an action intended to destroy the corporation proper, the franchises granted by the State, the legal entity, the artificial being, yet it is completely analogous in its character to such action; the effect is the same. It seeks a forfeiture of rights, powers, privileges and franchises granted by the city to the railway company and a forfeiture of its property. Hence, it rests upon the same legal principles as *quo warranto* or an information in the nature of *quo warranto*, and it will require the same quality and amount of evidence to sustain it. The city council, in attempting to pass the ordinance repealing the rights and franchises of the railway company and forfeiting its property before any judicial examination or adjudication that the ordinance had been violated by the company, arbitrarily arrogated to itself, a legislative body, the functions and powers of the judiciary, thereby violating the provisions of the constitution of both the State of Illinois and the United States. Art. 3, and Sec. 2 of Art. 2, Constitution of Illinois; Sec. 1, Art. 14, of Amendments to the Constitution of U. S.

Dillon on Municipal Corporations, Vol. 1, Sec. 345 (3d Ed.), says: "To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is rea-

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sonably adopted that such authority must be expressly conferred by the legislature. And even if the power to declare a forfeiture is conferred, still no person can by ordinance be deprived of his property by forfeiture without notice or without legal investigation or adjudication; an ordinance in violation of this principle is void as contrary to the genius of our laws and institutions." *Hart v. Mayor, etc., of Albany*, 9 Wendell, 571; *Cotter v. Doty*, 5 Ohio, 398; *Rosebaugh v. Saffin*, 10 Ohio, 32.

Chancellor Kent lays it down that it is a well established principle of law that a corporation can not be dissolved by reason of misuser or non-user of its franchises until a default has been judicially determined. 2 Kent's Commentaries, 305, 312; *Angell & Ames on Cor.*, 835; *Cooley's Const. Lim.* (5th Ed.), 337; *Dartmouth College v. Woodward*, 4 Wheat. 518; *New Jersey v. Wilson*, 7 Cranch. 164; *Planters' Bank v. Sharp*, 6 How. 301; *Binghamton Bridge Case*, 3 Wall. 5; *Enfield Toll Bridge v. Connecticut River Co.*, 7 Conn. 53; *Grammar School v. Burt*, 11 Vt. 632; *State v. Heyward*, 3 Rich. (S. Car.) 389; *People v. Manhattan Co.*, 9 Wend. 351; *Maryland University v. Williams*, 9 Gill & John. (Md.) 402; *Commonwealth v. Cullen*, 13 Pa. St. 132; *Bridge Co. v. Hoboken Co.*, 13 N. J. Eq. 81; *State v. Commercial Bank*, 7 Ohio, 125; *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642; *Bruffett v. G. W. R. Co.*, 25 Ill. 310.

The powers of the city are wholly legislative in their character and not judicial. The power to determine whether the railway company had violated any of the terms or conditions of the ordinances under which it operated its road is purely judicial, and the city had no authority under the law to exercise judicial power. *City of Galesburg v. Hawkinson*, 75 Ill. 153; *Buffett v. Gt. W. Ry. Co.*, 25 Ill. 303; *Detroit v. Detroit and Howell Plank Road Co.*, 43 Mich. 140.

In *Flint & Fentonville Plank Road Co. v. Woodhull*, 25 Mich. 112, Judge Cooley, in delivering the opinion of the court on this subject, said: "The determination whether a corporation has violated its charter is judicial in its

nature. It requires the actions of those tribunals which must hear before they condemn, and must proceed upon inquiry. If it were properly legislative, it may be that the legislature must be presumed to have given a hearing; but the fact, as we have seen, in this case is otherwise, and the cases in which presumptions are to be indulged against the facts ought not to be multiplied. It is sufficient to say that, in our opinion, the case is one in which the party is entitled to a trial of right in fact, and can not be put off with one which rests exclusively in a presumption of law, indulged against the fact. The violation of the charter can not be legally made to appear, except on a trial in a tribunal whose course of proceeding is devised for the determination of questions of this nature."

Ordinances of municipal corporations may impose penalties on parties guilty of violation thereof, but they can not impose forfeiture of property or rights without express legislative authority. *State v. Ferguson*, 38 N. H. 324; *Phillips v. Allen*, 41 Penn. St. 481.

The forfeiture of franchises does not include the forfeiture of property. Property rights can not be confiscated by the State or any of its municipalities, or prevented from devolving according to the ordinary rules of equity and the common law. *Morawetz on Private Corporations* (2d Ed.) Sec. 1033; *Bacon v. Robertson*, 18 Howard, 486; *Commercial Bank of Natchez v. Chambers*, 8 S. & M. 52; *Rowland v. Meader Furniture Co.*, 38 Ohio St. 270.

Even where the right is expressly reserved in the charter or contract to forfeit the franchises of a corporation, still no forfeiture can be declared by the legislature until a legal examination and adjudication is first made by the court. And if the legislature itself does not possess this right, the consent of this corporation can not confer the right. *Regt. Univ. of Maryland v. Williams*, 9 Gill & John. (Md.) 410; *C. & C. v. Railroad Co.*, 4 Gill & John. (Md.) 144; *Flint & P. M. R. R. Co. v. Woodhull*, 25 Mich. 99; *Am. Law Register* (new series) Vol. 5, p. 584.

In *Pacific R. R. Co. v. Leavenworth*, 1 Dillon's W. S. C.

R. 393, relied upon by appellee, the injunction at first denied was afterward granted (pp. 401, 402).

In *Atty. Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371, 389, Chancellor Kent, in discussing the powers of courts of equity upon this subject, said: "When the question is whether a corporation has forfeited its charter, or usurped a franchise, or has broken a penal law, this court is not the proper tribunal to sustain the prosecution or inflict the punishment." *Atty. Gen. v. Bank of Niagara*, Hopk. 354, 360; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 88; *People v. Albany, etc., R. R. Co.*, 24 N. Y. 261; *Atty. Gen. v. Bank of Michigan*, Harring. Ch. 321; *Atty. Gen. v. Tudor Ice Co.*, 104 Mass. 244; *Folger v. Columbian Ins. Co.*, 99 Mass. 274; *Slee v. Bloom*, 5 Johns. Ch. 377; *Doyle v. Peerless Petroleum Co.*, 44 Barb. 239; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Society for Establishing Manufactures v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157; *Doremus v. Dutch Reformed Church*, 3 N. J. Eq. 348; *Prest. v. Trenton City Bridge Co.*, 13 N. J. Eq. 46.

The same view has been taken in England in *Atty. Gen. v. Great Eastern Ry. Co.*, L. R., 11 Ch. D. 449, 503.

A court of equity will rarely, if ever, enforce a forfeiture. *Morris v. Tillson et al.*, 81 Ill. 607.

A forfeiture can never be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than a direct proceeding for that purpose. *Waite on Insolvent Corporations*, Sec. 403; *Laffin & Rana Powder Co. v. Sinsheimer*, 46 Md. 315; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 74; *Wallamet Falls Canal Co. v. Kittridge*, 5 Sawy. 44.

The city only by virtue of the authority conferred upon it by the State had the power to grant the franchises to the company to construct and operate its railway, and as the rights which the city is attempting to revoke came from the State through the city, the proceedings to revoke and forfeit the franchises must be the same as if the State itself was instituting proceedings to forfeit the charter. The effect of the decree rendered on the petition of the city is to destroy the corporation, but the law is, that only the power which

creates can destroy. The government having created the corporation for certain specified purposes, is entitled to a voice in its destruction. If the franchise granted by the State, or by the city through the State, has been abused or violated, that is a public wrong which the people must resent. Hence the origin of the rule that the government or people are the proper parties to institute forfeiture proceedings. And a court of law, rather than a court of equity, is the forum to determine a forfeiture. Waite on Insolvent Corporations, Sec. 400; *Whitney v. Wyman*, 101 U. S. 392; *National Bank v. Mathews*, 98 U. S. 628; *State v. P. & T. Turnpike Co.*, 21 N. J. Law, 9; *Commonwealth v. Allegheny Bridge Co.*, 20 Penn. St. 185; *Farnham v. D. & H. Canal Co.*, 61 Penn. St. 265; *State v. Moore*, 19 Ala. 514; *Rice v. National Bank of Commerce*, 126 Mass. 300; *Merrick v. Van Santvoord*, 34 N. Y. 208; *People v. Northern R. R. Co.*, 42 N. Y. 308; *Nat. Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. (Eq.) 755; *People v. Jackson & Michigan R. R. Co.*, 9 Mich. 285; *People v. Albany & Vermont R. R. Co.*, 24 N. Y. 279.

The petition was filed in order to enable the officers of the city to remove the tracks from the streets and at the same time not to make them liable to be arrested and fined for contempt of court in interfering with property in the custody of the court. That was its sole object and that its only prayer; and the relief granted can not be broader or different than that prayed for. A party in equity can not recover more than he has prayed for, or in a case different from that made by his pleading. *Ellis v. Sisson et al.*, 96 Ill. 105; *Dinwiddie v. Bell et al.*, 95 Ill. 360; *Morris v. Tillson et al.*, 81 Ill. 607.

This petition was not framed for, nor intended to be, a cross-bill; it has none of the necessary elements of a cross-bill; but even if it had been intended for a cross-bill, and framed as such, no relief could be granted upon it, for it is well settled that a cross-bill must be confined to the subject-matter of the original bill. A subject-matter of litigation foreign to the subject-matter of the original bill can not be admitted into a cross-bill. The subject-matter of a cross-

bill must grow out of and be connected with the subject-matter of the original bill. *Hurd v. Case*, 32 Ill. 45; *Thompson v. Shoemaker*, 68 Ill. 256; *Lund v. Skanes Enskelda Bank*, 96 Ill. 181.

Those who are made defendants to it and who are not in court must be brought in in the same manner as upon an original bill, and required to answer. Indeed, it is in the nature of a separate and distinctive suit. *Ballance v. Underhill*, 3 Scammon, 453.

MESSRS. AUGUST BARTHEL, City Attorney, JAMES A. FARMER and TURNER & HOLDER, for appellee.

The authority given by the city to the appellant was a license, and became by the acceptance of the company a contract, the same as a contract made between individuals, subject to the same rules of law, enforceable, revokable, and to be annulled in the same manner as if between two individuals. *C. C. Ry. Co. v. The People ex rel.*, 73 Ill. 541; *City of Quincy v. Bull et al.*, 106 Ill. 337; *Chicago Mun. G. L. & T. Co. v. Town of Lake*, 130 Ill. 42; *Pacific R. R. Co. v. Leavenworth*, 1 Dill. (U. S. C. C.) 392.

The franchise was derived from the State—that is, the right and power—but by reason of a limitation in favor of municipal corporations, the right to exercise that power depended upon the consent of the city, which was given by ordinance and accepted by the company, with all the burdens and liabilities imposed by that ordinance, and subject in all respects to the terms of that ordinance. This made the ordinance a contract, and according to the provisions of that contract the parties must be governed.

“If authority is given to construct a railway in the streets of a city or town, provided the company first obtains the consent of such municipal corporation, such corporation may impose reasonable conditions upon which the road shall be built—as, that it shall pay all damages which shall accrue to property owners, or any condition which is deemed essential for the protection of the interests of the public, *or the safety or convenience of travelers upon*

the streets or highways." Wood's Railway Law, Vol. 2, Sec. 273; St. L., Van. & Terre Haute R. R. Co. v. Capps, 72 Ill. 188; Pacific R. R. Co. v. Leavenworth, 1 Dill. (U. S. C. C.) 329.

The power conferred upon a city to give or withhold its consent to the construction of a railroad within its limits, is not limited to saying yes or no. In giving such consent, the city may attach conditions. Union Depot R. R. Co. v. Southern R. R. Co., Vol. 4 Am. Railroad and Corporation Cases, 622; Joy v. St. Louis, 138 U. S. 1; Sioux City Street Ry. Co. v. Sioux City, 138 U. S. 98; Chicago, M. G. L. & F. Co. v. Town of Lake, 130 Ill. 42.

And having attached a condition to an ordinance granting a privilege or license to a corporation to construct a street railway in its street, or to lay water or gas pipes, and the corporation or individual seeking such privilege having accepted the provisions of such ordinance, takes the privilege granted, subject to all the conditions in such ordinance contained. And the city authorities may, by force, assert the rights of the city reserved by such conditions. Chicago M. G. S. & F. Co. v. Town of Lake, 130 Ill. 42; Havelman v. The Kansas City Horse Railroad Co., 79 Mo. 641; Knight v. K. C., St. J. & C. B. R. R. Co., 70 Mo. 231; Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 363.

Counsel for appellant, in all the phases of their argument, insist that there is here a forfeiture of a franchise, and could only be done by an adjudication instituted directly for that purpose. Now we contend that even though the legislature itself had granted this right, it would be competent to repeal the act, providing the original act had reserved the right to do so. This power to repeal is reserved either absolutely or conditionally. If it is reserved conditionally, to be exercised only in case a certain event shall happen, the legislature may enact the repeal whenever the event happens. 4 Am. & English Encyc. of Law, 300; Creass v. Babcock, 23 Pick. 234; Erie & North East R. R. Co. v. Casey, 26 Pa. St. 287; Commonwealth v. Pittsburg, etc., R. R. Co., 58 Pa. State, 46; Miner's Bank v. U. S. Bank, 1 Greene, 561; McLaren v. Pennington, 1 Paige, 102; Fer-

guson v. Miner's, etc., Bank, 35 Tenn. 609; Read v. Frankfort Bank, 23 Me. 318; Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 146; Myrick v. Brawley, 33 Minn. 377; Oakland R. R. Co. v. Oakland B. & F. V. R. R. Co., 45 Cal. 365. (Reported in 13 Am. Reports, page 181.)

In the latter case the court says that if a franchise is granted by the legislature to construct a street railroad within a certain time, with a condition that if the provisions of the act are not complied with, the franchise shall be forfeited, a failure to lay the track within the time limited, works a forfeiture of the right to lay the tracks without a judgment at the suit of the State declaring a forfeiture, and the legislature may confer the franchise upon any other company or person.

In Miner's Bank v. U. S. Bank, the Iowa Supreme Court went still further and held that not only the fact on which the right of repeal depended might be noticed by the legislature without the assistance of the judiciary, but that its truth could never afterward be questioned by any court. It is urged by counsel for appellant that the repealing of the ordinance works a great hardship upon appellant; that it would be a destruction of the property of the appellant to permit the repealing ordinance to stand. This is a plausible argument; but who shall suffer this loss and inconvenience—the appellant or appellee? Is not appellant responsible for this condition of affairs? Did not appellant see and understand these sections and the rights the city reserved when it accepted the ordinance? If appellant suffers from the exercise of the powers and rights reserved by appellee, surely it can censure no one but itself for accepting the ordinance containing such reservations.

MR. JUSTICE SAMPLE. The primary questions presented in the foregoing statement of facts are as follows:

First. Can a municipal corporation impose reasonable conditions on a street railway company in its ordinance granting the right to use its streets for railway purposes,

which relate to the operation of such road after its construction, and reserve the legal right, on its own adjudication of a failure to comply with such conditions, to repeal such ordinance and thereby divest the company of its property in such grant?

Second. If it can not do so, what proceedings must it institute to test the question of the violation of such conditions, and did the city of Belleville pursue the course prescribed by law.

There are other incidental questions that arise: first, as to the sufficiency of the petition; second, as to the parties that should be made defendant; third, as to whether the cause should have been referred to the master; fourth, as to the right of trial by jury; fifth, as to the right of the city attorney to file the petition without a showing of authority from the city council.

In some of its features, at least, the case presents some new questions. The Citizens' Horse Railway Company was chartered by the sovereign power of the State. Its charter, as an instrument, evidenced its public grant of authority to do a certain thing, viz.: In the language of the statement filed with the Secretary of State, upon which the certificate of incorporation was issued, "to construct, maintain and operate a horse railroad in the streets of the city of Belleville, in St. Clair County, Illinois." The right to do that thing was what is called its franchise.

Apparently the grant was in and of itself full and complete, yet it could not be enforced as against the will, or exercised without the consent of the municipal corporation of Belleville, which had the control of the streets.

The power of the legislature was limited by Sec. 4, Art. 11, of the Constitution of 1870, which provided that "no law shall be passed by the General Assembly, granting the right to construct and operate a street railroad within any city, without requiring the consent of the local authorities having the control of the streets proposed to be occupied by such street railroad." Hence, in contemplation of law, the charter was granted subject to that condition. In the

absence of such limitations, "the legislature has the undoubted power to authorize, at pleasure, the use of streets for railroad purposes." Dillon on Municipal Corporations, Sec. 570.

It is doubtful if the provision of the constitution, however, which operated as a limitation upon the power of the legislature itself, operated to vest the power in the municipality to grant such consent. Hence, the legislature, by Par. 24 of Sec. 1, Art. 5, of the General Incorporation Act, relating to cities, in force July 1, 1872, vested municipalities with that power as follows:

"To permit, regulate, or prohibit the locating, constructing or laying a track of any horse railroad, in any street, alley or public place." However, such power so granted by the legislature, gave at least no express authority to impose conditions. So by Sec. 3, Chap. 66, of "An Act in regard to Horse Railroads," in force July 1, 1874, it was provided that "the consent of such municipality may be granted * * * upon such terms and conditions, not inconsistent with the provisions of this act, as such corporate authorities * * * shall deem for the best interest of the public." By Sec. 4 of said act it is provided that "every grant to any such company of a right to use any street * * * shall be subject to the right of the proper authorities to control the use, improvement and repair of such street * * * to the same extent as if no such grant had been made, and to make all necessary police regulations concerning the management and operation of such railroad, whether such right is reserved in the grant or not."

It is clear, therefore, that under express statutory law, the city of Belleville had the legal right and authority to impose such terms and conditions as it deemed best for the interests of the public.

While the court may have the power to determine whether such terms or conditions, and the mode of their enforcement, contravene established principles of law, subject to which rule the exercise of all subordinate authority exists, yet beyond that the court can not go. This brings

us to the question first presented, whether the city of Belleville had the lawful right to adjudicate and determine for itself, whether or not the conditions imposed on the company had been violated, and having determined that they had been violated, repeal the ordinance granting the rights and privileges under which the road was constructed and operated.

It must be held that the power granted to the city to impose terms and conditions, presupposed that it would be exercised in accordance with and subject to those fundamental principles of right and law which protect property, one of which is, that "no person shall be deprived of property without due process of law."

"Due process of law" has reference to judicial proceedings, according to the course and usage of the common law. *Campbell v. Campbell*, 68 Ill. 462.

That the right and privilege to construct and operate a horse railroad in the streets of a city, for the purpose of carrying passengers for hire, is property, is unquestioned and unquestionable, if the road is constructed and completed in accordance with the terms imposed.

Such privilege constitutes the principal value of such property. The test as to whether such privileges become vested property seems to depend upon the kind of terms imposed—that is, whether they are of that character, as affecting such rights and privileges, as create conditions precedent or conditions subsequent. If the former, then it is said such rights and privileges do not vest as property; if the latter, they do vest. *Washburn on Real Property*, Par. 11, p. 449. Without indulging in the refinements of the law as to estates on conditions precedent and conditions subsequent, practically and plainly the law seems to be that the power exists to impose terms as to the time and character of the road to be constructed, upon the fulfillment of which depends the maturing of the grant, and while such conditions are being fulfilled within the time prescribed, if there is a limit, the grant remains inchoate. These are termed conditions precedent, while those terms imposed that affect the man-

ner of operating the road and its state of repair after its proper construction, are said to be conditions subsequent, in which case such a grant becomes vested property, with all the rights attached that secure tangible property.

In this case the conditions imposed, which it is claimed have been violated, were conditions subsequent—that is, conditions affecting the operation of the road after its proper construction, and the keeping in proper repair the streets and tracks—so that the grant had vested as property and could only be divested by due process of law.

It is said, however, that the ordinance in question, when accepted by the railway company, became a contract subject to revocation at the will of the city, that right having been reserved. This seems plausible, and is the law, while the contract remained executory—that is, until the road was constructed in accordance with the terms prescribed. After that time, even if the ordinance is considered merely as a contract, it then becomes an executed contract ripened into a perfected grant—vested property—notwithstanding the terms imposed therein, upon which, as vested property, the subsequent conditions continued to operate under the law as applicable to such conditions. Under that law, it is not left to one of the parties to the original contract to enter judgment of forfeiture of the property of the other party to the contract, and thereby divest him of his rights. It is a question of fact whether the cause of forfeiture exists. The determination of that question would be for the courts and not the city of Belleville.

There would have to be a legal investigation where both parties could be heard, and a judicial determination upon the facts so developed. That would be due process of law. Booth's Street Railway Law, Sec. 49, p. 66, and notes. It is said, however, that there was such hearing and judicial determination in this case. This brings us to a consideration of the remedy that should be pursued.

The forfeiture here claimed is of all the rights and privileges granted by the ordinances to the Citizens' Horse Railway Company the effect of which would be, not to annul

the charter and dissolve the corporation, but to render the charter and the franchise inoperative. It would be tantamount to an ouster from the franchise; that is, the right to do that thing evidenced by the charter, viz., "operate a horse railway in the streets of the city of Belleville." It would seem, in a sense, that the rights and privileges granted by the city of Belleville are a part of the franchise, and a vital part.

A municipality does not stand in the same relation to such a charter and franchise merely because it has control of the streets, that an individual does who owns lands within the line of the right of way of an ordinarily incorporated railroad company. In the latter case the charter is complete when granted by the State, and carries with it under the law of eminent domain the power to execute, with or without consent of such owner of land, the franchise.

In the former case, the municipality is related to the State as its agent, invested with constitutional rights as well as delegated power in regard to the right to operate in its streets horse railways, without whose action, and by incorporating its consent in the charter granted by the State, the franchise is a nullity. How can it, then, be legally and logically said that that consent which is absolutely necessary to the vitality and execution of the franchise is no part of the franchise itself? Since the constitution of 1870, it is believed that the right to create and perfect such a franchise as is involved in this case rests both in the State and the municipality, and that the consent of the municipality, when granted, is a part of the franchise.

The fact that the ordinance when accepted by the company created a contract between the parties does not affect this view. The charter of the appellant is in a sense just as much a contract with the State, as is the ordinance with the municipality. The contract feature, however, is limited to those provisions of the charter or ordinance relating to the dealings between the incorporated company and the State or municipality as such, and does not extend to those provisions relating to the dealing of such incorpo-

rated company with the public. If these views are correct, then in a limited, if not in the full sense of the term, the franchise of the appellant was attempted to be involved, in which case it follows that the proceedings to declare and enforce a forfeiture should have been in a direct proceeding by *quo warranto* under Chapter 112 of the Statutes.

It is held in the case of *The Attorney General v. The C. & E. R. R. Co.*, 112 Ill. 520, that a cause of forfeiture of a franchise can not be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation.

Such a proceeding does not involve fraud, accident, mistake or irreparable damages, and where the remedy is complete and adequate at law, equity will not take jurisdiction. *Keigwin v. Drainage Com'r*, 115 Ill. 347.

It is believed that the following authorities sustain our view that a franchise is involved, and that the remedy is by *quo warranto*: *State ex rel. Att'y Gen'l v. Madison Street Ry. Co.*, 72 Wis. 612, cited in Secs. 49 and 52, Booth on Street Railway Law.

In view of what has been said it is not necessary to dwell upon the other points made in this appeal. It may not be inappropriate, however, to add that the paper filed by the City of Belleville, called in these proceedings a petition, is not and does not purport to be an intervening petition or other paper legally related to the foreclosure proceedings. No one is made or asked to be made a party defendant or asked to answer what is set up. It is more in the nature of an affidavit in support of a motion to the court to release from its control and custody the property of the appellant, in order, to quote the concluding part of the affidavit, that the city may "remove the tracks, turn-outs, switches, etc., of said Citizens' Horse Railway Company, or said street railway, from the streets of said city of Belleville." The attitude of appellee as disclosed by its affidavit or petition is, without speaking disrespectfully, that of party, judge and sheriff, all in the same case. It, although a party, had tried

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the case and passed judgment, from which there was to be no appeal, involving property of the value of about \$30,000, of which the court, by its receiver, had taken control in the foreclosure proceeding.

The city of Belleville boldly asked that the court should release control of the property without trial, so that its officers might execute its sentence of removal and forfeiture, and thus oust the Citizens' Horse Railway Company of its franchise.

This, we hold, was but an attempt to involve a franchise in this proceeding. While this court would not have jurisdiction to consider an appeal which involved a franchise—that is, where its judgment would result in sustaining or ousting a franchise, yet it is considered that it has jurisdiction to determine whether or not the proceedings instituted were such as could legally involve a franchise. For the reason stated, it is considered there was error in that part of the decree from which this appeal was prosecuted. That part of the decree is reversed, with directions to strike what is called the petition from the files of the court.

EAST ST. LOUIS GAS LIGHT & COKE CO. FOR USE OF
WILLIAM D. GRISWOLD

V.

THE CITY OF EAST ST. LOUIS ET AL.

Gas Companies—Contract with Municipality to Supply Gas—Repudiation of.

In an action brought by a gas company for the use of a person named, against a municipality, to recover damages for the repudiation by the latter of a contract with the former, providing for a supply of gas for the period of thirty years, said person being the assignee of such contract, this court holds the same to have been invalid, one which the city could at any time repudiate; that the declaration did not state a good cause of action; that the general demurrer was properly sustained thereto, and that the judgment against the plaintiff for costs, can not be interfered with.

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[Opinion filed March 17, 1893.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. WILLIAM C. KUEFFNER and DILL & SCHAEFER, for plaintiff in error.

Mr. F. G. COCKRELL, for defendants in error.

MR. JUSTICE GREEN. Without setting out in detail the averments of the amended declaration, except as hereinafter mentioned, it is sufficient to say that this suit was brought by plaintiff in error for the use of Griswold, to whom it assigned a contract entered into on October 4, 1874, between the city of East St. Louis and plaintiff in error, to recover damages for the repudiation of said contract by the city.

By the terms of the contract the city agreed to take gas from plaintiff in error, and that said contract should continue for the term of thirty years from and after October 1, 1874. It is averred in said declaration that on the faith of said contract, the gas company expended \$30,000 in providing posts, lamps, pipes, etc., necessary to furnish the gas, which expense it would not have incurred except for and in reliance upon said contract. That on February 19, 1890, the city, by a resolution of the city council, repudiated said contract, and thereupon on the 20th day of February, 1890, the mayor and city clerk notified said Griswold of the said action of said council and furnished him with a certified copy of said resolution, and has from thence refused to take or pay for said gas. That long before February 19, 1890, Griswold had become and then was and still is, the assignee of said contract, and of all the rights and demands growing out of the same, and was on said date, and ever since has been and still is, ready to comply with the terms of said contract, and furnish such gas until the expiration of said contract by lapse of time; that by reason of such repudiation, said posts, lamps and gas pipes have become greatly reduced in value and have become next to worthless, and said Griswold has

lost the profits he would have made if said contract had not been repudiated. A general demurrer was interposed to this declaration and sustained by the court. Plaintiff elected to stand by the declaration, whereupon judgment was entered against it for costs, and plaintiff sued out this writ of error. Counsel for plaintiff in error suggests that the only question for our consideration is, does the declaration state a cause of action? This is so, if the question was, does the declaration state a good cause of action? Counsel then state their position thus:

First. "This is an action for damages for repudiation of a contract. If this were a contract between two individuals, our inquiry would have to be answered in the affirmative."

Second. "That a city is not at liberty to annul its contracts. It has no more rights in this respect than an individual," and cites *Hewett v. Town of Alton*, 7 N. H. 257; *State v. Heath*, 20 La. Ann. 1721; *West Sav. Society v. Philadelphia*, 31 Pa. St. 175; *Davenport Export Gas Co. v. Davenport*, 13 Iowa, 233. These same citations appear in the brief of counsel (who took the same position as counsel for plaintiff in error here does) in *E. St. L. v. E. St. L. Gas Light & Coke Co.*, 98 Ill. 415. Yet, in the principal opinion, it appears the court, even with the aid furnished by the authorities, was not impressed with the soundness of the doctrine contended for by counsel for plaintiff in error, but say, "Whether this length of time of the running of the contract be a valid objection to it, we deem it unnecessary to determine for the purpose of this suit, and would not be understood as expressing any opinion in that regard; for, admitting that the contract can not be upheld in that respect, it is an objection, we conceive, which only applies to the *executory* part of the contract and has no application to the *executed* part of it." The separate dissenting opinion of Justice Walker demonstrates, by clear and conclusive reasoning, that as an executory contract, this contract of October 4, 1874, is invalid and void, and, as we think, nothing said in the principal opinion controverts such ex-

pression, but, on the contrary, it is there conceded that the city could at any time avoid this contract. We adhere to our ruling in the case of *City of E. St. L. v. E. St. L. Gas Light & Coke Company*, reported in 19 Ill. App. 44. The cases of *Quincy v. Bull*, 106 Ill. 337, and *Prince v. Quincy*, 105 Ill. 138, are not in point, and we hold the city had the right to disaffirm, as it did, the said contract. It follows, then, that in our opinion, the declaration does not state a good cause of action; that the general demurrer was properly sustained thereto, and the court did not err in entering judgment against appellant for costs. The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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JACKSONVILLE, LOUISVILLE & ST. LOUIS RAILWAY
COMPANY

V.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Railroads—Rent of Track, Depot and Terminal Facilities—Successor of Lessee.

1. The words "terminal facilities," as understood by those operating railroads, do not include tracks other than those used in making up trains.

2. In the case presented, this court holds that a track named, was not a part of plaintiff's terminal facilities, and that switching cars over it to and from certain car shops, was a service separate and distinct from those services mentioned or included in the contract sued on, and that the plaintiff is entitled to recover the amount such separate service was reasonably worth.

3. This court likewise holds that the evidence in the case presented warranted the jury in finding that defendant road was the successor of the original lessee, and operated its trains over plaintiff's track, had the benefit of plaintiff's franchise, and the use of its depots and terminal facilities, and was furnished by plaintiff with labor, materials and supplies, in the same manner its predecessor had been supplied, and that plaintiff was entitled to recover therefor; and further, that under the common counts the plaintiff was not bound to prove a special contract,

in order to recover a reasonable price for the use and occupation of its property.

4. This court holds also that if plaintiff and defendant recognized and acted under the contract in question as a valid and binding contract between them, during the time defendant used and occupied plaintiff's property, no formal assignment of the same was necessary to a recovery under it by the plaintiff for a breach of its conditions.

5. An instruction which has no application to the facts proven, should be refused; likewise one that is misleading and not based upon the evidence; likewise one that is superfluous, instructions given, containing matter included therein.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Jefferson County; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

Messrs. ISAAC L. MORRISON and C. H. PATTON, for appellant.

Mr. J. M. HAMILL, for appellee.

MR. JUSTICE GREEN. This was a suit in assumpsit by appellee against the appellant, brought to recover rent of track, rent of depots and terminal facilities at Mt. Vernon, Illinois, supplies, materials and labor, and for switching cars by appellee for appellant to and from the shops of a company in Mt. Vernon engaged in the business of manufacturing and selling railroad cars.

The declaration contains seven counts, six common counts and one special count, on the following contract:

"This agreement made this 15th day of April, A. D. 1888, by and between the Louisville & Nashville Railroad Company, a corporation organized and existing under the laws of the State of Kentucky, as lessee of the Southeast & St. Louis Railway, party of the first part, and the Jacksonville Southeastern Railway Company, and as owner of the Louisville & St. Louis Railway, its successors and assigns, a corporation organized and existing under the laws of the State of Illinois, witnesseth:

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That, whereas, the party of the second part has constructed and is operating a line of railway from Jacksonville, Illinois, to Driver's Station in Jefferson County, Illinois, which is the present terminus of said party of the second part, and is situated on the line of the Southeast & St. Louis Railway, about five miles west of Mt. Vernon, Illinois, for the joint use and maintenance of which station an agreement has been entered into between the parties of the first and second part and dated the 12th day of May, 1888.

And, whereas, the party of the second part is desirous of securing traffic rights over the line of the party of the first part between said Driver's Station and Mt. Vernon, Illinois, together with terminal facilities in said city of Mt. Vernon, it is hereby agreed, as follows:

1. That for and in consideration of the annual rent of five hundred dollars (\$500) per mile, payable semi-annually, to be paid by said party of the second part to said party of the first part, said party of the first part hereby demises, rents and leases to said party of the second part, the joint use of its track between said Driver's Station and said Mt. Vernon Station, including the right to make connection with the Louisville, Evansville & St. Louis Railroad Company, at Mt. Vernon, the distance between said stations, for the purpose of this agreement, being estimated at five miles; the parties hereto to have equal traffic rights upon said track between said stations, the trains of both parties of the same class to have the same rights, and where the time of trains of the same class conflicts, an equitable division of differences shall be made; the term of this lease to continue from the 15th day of April, 1888, to the 15th day of April, 1893, and thereafter, until abrogated by written notice, as hereinafter provided. Should either party desire to abrogate the foregoing provisions, it shall give to the other party one year's written notice of its intention so to do. Should it be desired to abrogate this lease at the expiration of the five years, notice shall be given at the end of the fourth year, by the party desiring to abrogate said lease,

the intention of the parties hereto being that the foregoing provisions of this lease shall not terminate under any circumstances except upon one year's written notice.

2. Should any damages result to persons or property at or between the stations above mentioned, from any act or negligence of the party of the second part, its officers, agents, servants or employes, while using the track and other facilities described in the first section hereof, said party of the second part agrees to hold said party of the first part entirely harmless against all such damages. And should said party of the first part be sued and judgment rendered against it for such damages, said party of the second part binds itself, its successors and assigns, to pay all of said damages, with all the costs and expenses incident thereto; or if said party of the first part should pay said damages, judgments, costs or expenses, said party of the second part agrees to refund the same to said party of the first part. Should any damages to persons or property result from any negligence or act of said party of the first part, its officers, agents, servants or employes, at or between said stations, said party of the first part agrees in like manner to hold said party of the second part harmless against all such damages.

3. Said party of the first part agrees to admit said party of the second part to the joint use of its facilities for conducting passenger and freight traffic, at Mt. Vernon, Illinois. The station agent at Mt. Vernon station and the employes under him engaged in conducting the passenger and freight traffic shall be the joint employes of the two parties hereto. Such agents and employes shall be selected and appointed by said party of the first part, subject to the approval of the said party of the second part. For the joint use of the depot facilities at Mt. Vernon, Illinois, the party of the second part shall pay to the party of the first part a reasonable rent, which shall be fixed from time to time by agreement between the superintendents or general managers of the parties hereto, and it is agreed that the expenses incurred in the conducting of said traffic at each station shall be divided between the parties hereto, as

follows: The proper portion of the agent's salary, which would be chargeable to passenger business, together with the salaries of such clerks as are engaged solely on passenger business, and the expenses of maintaining passenger waiting rooms, heating and lighting the same, etc., shall be divided in the proportion that the number of tickets sold for each party bears to the total number of tickets sold at said station for both parties, and the remainder of the agent's salary, and the salaries of the freight clerks and other employes engaged solely in freight business, together with the expenses of maintaining and operating the joint freight depot, and the wages of the enginemen and firemen on the switch engines at said station, shall be divided in the proportion that the number of tons of freight handled for each party at said station bears to the total number of tons of freight handled for both parties; provided, that in the computation of such freight business, the tonnage interchanges coming from one road and going to the other, shall be counted to each road. But the party of the second part shall not be required to pay any portion of the expenses of maintaining tracks at said station, or for any repairs to, or maintenance of the said switch engines at said station.

4. The said party of the first part will furnish to said party of the second part such round-house room as it can spare, without charge; and for the following services, said party of the second part agrees to pay to said party of the first part the following amounts set opposite each item:

Wiping one engine.....	\$1 10
Turning one engine.....	15
Tank of water.....	25
Firing up engine (including wood).....	50
Washing boiler.....	1 00
One extra tank of water for washing out boiler	25
Each box of sand.....	40

The enginemen of said party of the second part to deliver and receive their engine at the round-house of said party of

the first part. If said party of the second part should desire any inspection of its engines or cars, or ordinary running repairs made on the same, the party of the first part will make such repairs on the written order of such employe of the party of the second part as may be designated in writing by the superintendent or manager of said party of the second part, and will charge actual cost of the same with ten per cent added; all of which charges, with ten per cent added, said party of the second part hereby agrees to pay.

5. Said party of the second part agrees to pay to said party of the first part, monthly, all the bills rendered by said party of the first part to said party of the second part, for all charges made by said party of the first part against said party of the second part under the third and fourth sections of this agreement.

6. The agent or other bonded employes at said Mt. Vernon station, shall be regarded as the agent or employes of said party of the second part as well as the agent or employes of said party of the first part. And such agents or employes shall be directly and severally liable to each of the parties hereto, for the respective business transacted by each party; and such agent or employes shall pay over all moneys received by him or them to each of the parties hereto for the respective business transacted by each according to the terms of this agreement. When the inspector of agencies or traveling auditor of either party hereto is sent to check the accounts of said agent or other employes, timely notice shall be given to the opposite party's accounting department, so that both parties may be represented and the condition of each party's account with said agent or other employes may be definitely and simultaneously ascertained and determined.

7. The third section, and all sections following it, of this agreement, may be abrogated by either party hereto, upon ninety days' written notice, given by the party desiring to abrogate said sections, to the opposite party. In testimony whereof the parties hereto have caused these presents to be duly executed by the proper authorized officers, and their

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corporate seals to be hereunto affixed, this twelfth (12th) day of May, 1888."

Defendant pleaded the general issue, a trial was had by jury and a verdict for plaintiff was returned for \$5,972.88 damages.

Defendant's motion for a new trial was denied, and judgment for plaintiff was rendered for the above amount and costs of suit. The record is brought up on appeal by the defendant, and this court is asked to reverse the judgment.

The amount recovered is made up of \$1,250 for rent of the five miles of appellee's track between Driver's and Mt. Vernon from December 1, 1890, to May 31, 1891; \$3,069.67 rent of depots and terminal facilities at Mt. Vernon, and supplies, materials and labor furnished by appellee from October 4, 1890, to May 31, 1891; and \$1,653.21 for switching cars, by appellant, to and from the Mt. Vernon car shops, from October 4, 1890, to November 10, 1891. The evidence shows that appellee furnished the trackage, depots, terminal facilities, supplies, materials and labor, during the periods respectively above mentioned, that the prices charged and so allowed by the jury were correct and in accordance with the terms of the foregoing contract, and that the respective amounts so allowed were due and unpaid to appellant when this suit was commenced.

The evidence also shows that from October 4, 1890, to November 10, 1891, appellee switched to and from said car shops 1102 loaded cars, for which it charged two dollars per car, and during the same period switched in like manner 330 empty cars, for which it charged fifty cents per car. It was proved and not denied, that the prices so charged for switching were reasonable. The aggregate amount charged therefor was \$2,369, but a credit on this of \$715.79 was allowed, because the switching of some of these cars, amounting to the latter sum, was improperly included in the tonnage charge, and the credit was properly given to prevent a double charge for the same service, thus leaving \$1,653.21, which was the amount allowed. It is contended on behalf of appellant that this balance due as a switching charge

had been paid, but an examination of the evidence in the record satisfies us it had not been paid either in whole or in part. Appellant, as we understand it, further insists that the terminal facilities at Mt. Vernon included the track to Mt. Vernon car works, and the switching of cars to and from the shops could not be charged for, under the contract, as a separate and distinct item at so much per car, but the expense of such service must be estimated upon the tonnage basis as provided in said contract. Our construction of the contract does not admit this interpretation. We must give it the meaning understood and intended by the parties at the time of its execution. Terminal facilities as understood by those operating railroads do not include tracks other than those used in making up trains, and the track put in upon the property of said Car Works Co., was not used for that purpose, did not belong to appellee, and was not a part of its terminal facilities, as appears by the testimony of Dickson, division superintendent of appellee, a witness qualified by his experience and knowledge of such matters to testify what the railroad men understood terminal facilities meant, and we presume those words were employed by the parties to the contract, to be interpreted in accordance with such general understanding by railroad men. Moreover, at the time said contract was executed the car works shops and track had not been built, nor, so far as appears by the evidence, was the building thereof then contemplated. We hold that said car works track was not a part of appellee's terminal facilities, and switching cars over it to and from the shops was a service separate and distinct from those services mentioned or included in the contract, and that appellee is entitled to recover the amount such separate service was reasonably worth.

It is further insisted on behalf of appellant that even if the trackage, depots, terminal facilities, supplies, etc., were furnished as claimed under the contract, and cars were switched to and from said car works shops, as claimed, and appellee could maintain a suit therefor, yet appellant was not liable, but the Louisville and St. Louis Railway Com-

pany would be, because it was the successor of the Jacksonville Southeastern Railway Company, and because appellant never owned or operated any railroad until February 1, 1891, but the Louisville and St. Louis Railway Company built the road from Centralia to Driver's, and in the summer of 1888, absorbed the Jacksonville Southeastern Railway and became its successor, and thereafter operated the two roads from Jacksonville to Mt. Vernon, and because appellant had no contract with appellee, and never ran a train over its road. It will be seen by referring to the contract between the appellant and the Jacksonville Southeastern Railway Company, dated May 12, 1888, that the latter party agreed on behalf of itself and its successors and assigns to comply with the terms thereof by it to be performed, among other things to pay the rents reserved and other charges for the term of five years, beginning April 15, 1888, and ending April 15, 1893, and thereafter until abrogated by one year's written notice, given by the party desiring to terminate said contract.

We have held in the case of St. Louis and Cairo Railroad Company v. East St. Louis and Carondelet Railway Company, 39 Ill. App. 354, affirmed by the Supreme Court, see 139 Ill. 401, that the right to operate trains of one company over the railroad track of another, necessarily includes the right to use the franchise of the latter, and such right could be lawfully leased by the owner of the railroad track to another corporation. And we also in the case cited hold, that if, after a railway company has given a deed of trust upon its property and franchise, it leases from another company the right to use its track, and afterward the deed of trust is foreclosed and the property and franchise is sold under the decree in foreclosure, to a third company, which continues to use the leased track in the same manner the lessee had done, such purchaser so using the track is liable to pay the rent agreed to be paid by the lessee to lessor as provided in the contract, and is bound by the terms thereof. In the case at bar, if the record discloses the facts to be, that the appellant was the successor of the Jacksonville

Southeastern Railway Company, and used the track, depots and terminal facilities of appellee, and was furnished by it and used labor, materials and supplies as charged, then appellant was liable to pay for the same in accordance with the terms of the contract and was bound thereby the same as though it had executed the contract originally.

We are satisfied the evidence warranted the jury in finding that appellant was the successor of the original lessee and operated its trains over appellee's track, had the benefit of appellee's franchise, and the use of its depots and terminal facilities, and was furnished by appellee with labor, materials and supplies, in the same manner its predecessor had been; that the switching service charged as a separate item was performed by appellee for appellant, and the latter was liable therefor. Appellant was incorporated January, 1890, and the purpose, as shown by the articles of incorporation, was to lease or purchase, own and operate a railway through the several named counties to Centralia. On July 1, 1882, the Jacksonville Southeastern Railway Co., then owning the railway completed from Jacksonville to Litchfield, and desiring to extend it to Centralia, gave it a trust deed, executed by its president, William S. Hook, to secure the payment of money loaned for the purpose of building such extension. The debt so secured was evidenced by the bonds of the company and was, by the terms of the deed, made a lien on the railway from Jacksonville to Centralia and on all the corporate property and franchises then owned or that were thereafter acquired by the company. *it*

This deed of trust was foreclosed at the February term, 1890, of the Marion Circuit Court, and by virtue of the decree entered in that proceeding the master in chancery sold all the mortgaged property to a committee representing the mortgage creditors who paid the full amount of their bid, except \$11,205 paid in cash, in the bonds secured by the trust deed, and received the master's deed for the property sold October 4, 1890. On January 3, 1891, this committee, in consideration of the payment to them of \$1,187,200, in the first consolidated mortgage bonds of the

appellant, conveyed all of said property to William Elliott, and he, on the same day, deeded all of said property to the appellant in consideration of \$1,180,200 paid in said first consolidated mortgage bonds, and \$1,500,000 paid in the capital stock of appellant, and it became the owner of all the railway from Jacksonville to Centralia, and all the property and franchises the Jacksonville Southeastern Railway Co. had formerly owned. This last named company ceased to exist on October 4, 1890, by reason of the sale then made of all its property, and we think the evidence in the record (which is not fully set forth in the abstract) justified the jury in finding that appellant became its successor on that date, and operated freight and passenger trains over the entire line from Jacksonville and Springfield to Mt. Vernon, during all the period within which the indebtedness sued for had accrued. The circumstances attending the master's sale, the character of the payments made to him, the subsequent conveyances by the bidders to Elliott, and by him to appellant, both made on the same day, the fact that the mortgage bonds of appellant formed the entire consideration for the conveyance to Elliott, and a large part of the consideration for the conveyance to appellant, and the further fact that William S. Hook was the president of the Jacksonville Southeastern Railway Co., and one of the incorporators of appellant company, incorporated January 18, 1890, one month before the said foreclosure proceedings were commenced, for the expressed purpose of purchasing the railway property and franchises sold by the master, all indicate that the purchase was made at the sale for appellant, in pursuance of a previous arrangement to accept its mortgage bonds in payment of the debt secured by the deed of trust, and permit appellant from the day of sale to enter into the possession of and operate its trains over the railway that was sold. Furthermore, there was evidence tending to prove that William S. Hook was the president of appellant, and notwithstanding he denied that fact, yet if the jury believed the witnesses for appellee they could properly find he was such president, and it is admitted

Marcus Hook was the auditor of appellant. It also appears that the summons in this case was served on Lutz as agent of appellant, and it is not denied he was its agent at Mt. Vernon.

In addition to the evidence already mentioned, the evidence of Lutz and Dickson, the depositions of Knott and Seawell and the letters of Marcus Hook, as auditor, attached as exhibits thereto. The statements of William S. Hook and his official correspondence as president, and that of Marcus Hook as auditor of appellant, with the officers of appellee, warranted the finding that from and after October 4, 1890, and during the entire period within which the indebtedness sued for accrued, appellant was the successor of the lessee in the contract of April 15, 1888, claiming the same rights said lessee acquired thereby, and as such successor, recognizing the said contract as existing and binding upon it, used the track and franchise of appellee between Driver's and Mt. Vernon, and its depots and terminal facilities there, and the labor, materials and supplies furnished by appellee as charged, in operating its train and carrying on its railway business, and that the switching service before mentioned was performed by appellee for the appellant as claimed. The amount recovered, comprising the several items as set out in this opinion, was due and owing to appellee, and the jury rightfully found appellant liable therefor. We find no reversible error in the ruling of the court in admitting or refusing to admit evidence. The claim by appellant that the Louisville & St. Louis Railway Co. was the successor of the lessee in said contract, and operated the trains over appellee's track and used the terminal facilities, labor, supplies and materials furnished by appellee, is not supported by the evidence. The Louisville & St. Louis Railway Co. owned no engines, cars, or equipment, and operated no trains. The first instruction given for plaintiff is as follows:

"No. 1. If the jury believe from the evidence that the defendant is the successor of the Jacksonville Southeastern Railway Company, and as such successor came into the pos-

session of the property, rights and franchises of the Jacksonville Southeastern Railway Company, and that the defendant since it first came into possession of the railway formerly owned by the Jacksonville Southeastern Company, had been operating such railway, and running its trains over the railroad of the plaintiff, between Driver's Station and Mt. Vernon, and between Mt. Vernon and Driver's Station, and using the terminal facilities of the plaintiff for freight and passenger business, at Mt. Vernon, and has been furnished with supplies and materials, labor and services, about the transaction of its business, by the plaintiff, while it was operating its trains over plaintiff's road, between the places above mentioned, and defendant has claimed the right under contract of April 15, 1888, between the plaintiff and the Jacksonville Southeastern Railway Company, to operate its trains over plaintiff's railroad, between the places above mentioned, and to use plaintiff's terminal facilities at Mt. Vernon for the transaction of its freight and passenger business, then the defendant is liable to the plaintiff for whatever sum you find from the evidence to be due, under the contract of April 15, 1888, for rent of track, terminal facilities, supplies and materials, labor and services furnished, if any, by the plaintiff, from the time defendant first commenced to operate and run its trains over plaintiff's railroad, until May 31, 1891.

Appellant complains of this instruction, and insists it was calculated to mislead the jury; that "it was intended by the court that the jury should understand it as laid down as law, that the Jacksonville, Louisville & St. Louis Railway Co., by virtue of the several conveyances, thereby became liable to the Louisville & Nashville Railway Co."

We do not think the court gave the instruction with the intent the jury should so understand it, or that they did so understand it; on the contrary, nothing in the instruction conveys such meaning; but it is therein clearly stated that to entitle plaintiff to recover *under the contract of April 15, 1888*, certain facts must be first proven. It was intended to inform the jury that plaintiff had a right to recover

under the specific contract set up in said special count of the declaration, provided such proof was made. Evidence was introduced, strongly tending to prove the several facts stated in the instruction; hence it was based on evidence, and the plaintiff was entitled to have it given to the jury as a correct proposition of law, when applied to a certain state of facts. What has been already said will apply to the objections made by appellant to the second instruction given for plaintiff. The plaintiff's sixth instruction is more voluminous than was necessary, but was not calculated to mislead the jury. They must have understood by it, that, if from the evidence they found defendant, in constructing and carrying on its freight and passenger traffic, used the track of plaintiff between Driver's Station and Mt. Vernon, and its depot and terminal facilities there, defendant was liable to pay plaintiff for such use and occupation, the amount they found from the evidence such use and occupation was reasonably worth. This was the law in that state of fact. Under the common counts plaintiff was not bound to prove a special contract in order to recover a reasonable price for the use and occupation of its property.

Plaintiff's seventh instruction could not have prejudiced defendant, but imposed upon plaintiff the burden of proving the assignment to it of the contract of lease, before it would be entitled to recover. This was requiring more of plaintiff than was necessary. If plaintiff and defendant recognized and acted under said contract, as a valid and binding contract between them during the time defendant used and occupied plaintiff's property, no formal assignment of the contract was necessary to a recovery under it by plaintiff for a breach of its conditions. The refusal by the court to give the seventh, eighth, ninth and tenth instructions asked for on behalf of defendant is also assigned as error. The seventh had no proper application to the facts proven and was properly refused. The eighth instruction was calculated to mislead the jury and was not based on the evidence. It was not error to refuse it. The ninth instruction was misleading and superfluous, the jury had full and correct

information given it by the court touching the same matters in the first, second and third instructions given on behalf of plaintiff, and it was not necessary to a fair trial that the same should be repeated. The court did not err in refusing to give defendant's ninth instruction. The tenth refused instruction does not state the law as we understand it, and ought not to have been given. We find no reversible error in giving the instructions on behalf of plaintiff, or refusing to give those which the court refused to give for defendant. The judgment is affirmed.

Judgment affirmed.

47 428
91 818

JAMES M. RIGOR ET AL.

V.

JONATHAN B. SIMMONS.

Fraudulent Sales—Attachment—Garnishment—Practice.

1. A bill of sale conveying all of a debtor's property to a creditor, with the provision that such creditor is to sell it, and after satisfying his own claim, return the balance, if any, to the debtor, will be regarded as an assignment for the benefit of a particular creditor and because of the reservation to the debtor, fraudulent, and void as to other creditors.

2. The court did not err in refusing to permit a person named, to be recalled to testify, on the day after both sides had closed their evidence and rested, nor in trying the case without a jury by agreement, the fact being that the trial judge had been counsel in a case to which one of the defendants was a party, previously tried before a justice.

[Opinion filed June 26, 1893.]

APPEAL from the County Court of Pope County; the Hon. GEORGE A. CROW, Judge, presiding.

Messrs. MORRIS, MOORE & MORRIS, for appellants.

Messrs. ROSE & SLOAN, for appellee.

Rigor v. Simmons.

MR. JUSTICE GREEN. Jonathan B. Simmons, a creditor of appellant Rigor, brought this suit in attachment to recover the debt due him, and set up in his affidavit as a ground for attachment that Rigor had within two years fraudulently assigned his property so as to hinder affiant in the collection of his debt. Appellants David H. and James F. Randolph were summoned as garnishees of Rigor. He traversed the affidavit by plea in abatement, and filed a plea of general issue to plaintiff's declaration. Issue was joined on these pleas. The Randolphs filed their answers to the interrogatories propounded to them as garnishees, admitting that Rigor made and delivered to them a bill of sale for a large quantity of lumber on November 19, 1892, which they allege they received in good faith in payment of a debt of \$538.86 then due them from Rigor, and for no other purpose, and without fraud. By agreement, a jury was waived and the cause was tried by the court. The findings of the court were in favor of appellee on all the issues, and also against the Randolphs as garnishees of Rigor. Proper judgments and orders were entered by the court on the findings. The material questions in this case, upon which the decision hinges, are: Was the sale and delivery of the lumber by Rigor to the Randolphs fair and *bona fide*, and made only for the purpose of satisfying an honest debt? if so, it was valid and should be held good; or, was the sale and delivery made for a fraudulent purpose, participated in by the parties to it, and intended to cover up a part of the effects of Rigor and place them beyond the reach of his other creditors? if so, it was a fraudulent and void sale, and by it the Randolphs acquired no right to the lumber or proceeds as against Simmons.

These questions can be fairly determined only by considering the acts and declarations of the parties to the sale, the circumstances connected therewith, and the consideration for which the lumber was transferred under the bill of sale.

We think the evidence in the record warranted the trial court in finding that on November 15, 1892, a final settlement of all accounts between Simmons and Rigor was made,

and a balance of \$300.06 was then due Simmons and remained unpaid when this suit was commenced. That on November 19, 1892, Rigor then owing this debt and in failing circumstances, which facts were then known to the Randolphs, executed and delivered a bill of sale and a large amount of lumber to the Randolphs for a pretended consideration of \$500, no part of which was then paid, and the amount of the indebtedness due from Rigor to them was not then fixed or ascertained. That at the time of the pretended sale and delivery of the lumber, there was a secret agreement between the parties to it, that the Randolphs were to take the lumber, sell it, and from the proceeds first pay the debt which might be found owing them from Rigor, and then pay over to him the net surplus of said proceeds. That at the time of the sale, Rigor told Randolph not to say anything to the other boys about it, thus indicating a fraudulent purpose. That the value of the lumber was largely in excess of the debt then due from Rigor to the Randolphs, as afterward settled between the parties.

If the evidence justified the court in finding the foregoing facts were proven, as we hold it did, the sale and delivery of the lumber to the Randolphs was fraudulent and void as to Simpson and they were liable as garnishees.

A bill of sale conveying all of a debtor's property to a creditor, with the provision that such creditor is to sell it, and after satisfying his own claim, return the balance, if any, to the debtor, will be regarded as an assignment for the benefit of a particular creditor, and because of the reservation to the debtor, fraudulent and void as to other creditors. *Selz, Schwab & Company v. Evans*, 6 Ill. App. 466; *Boies, Adm'x, v. Henney*, 32 Ill. 130; *Slattery v. Stewart*, 45 Ill. 293; *Hardin v. Osborne*, 60 Ill. 93; *Power v. Alston*, 93 Ill. 587.

It is insisted on behalf of appellant that these authorities cited in appellee's brief do not apply to the facts in this record, but in our judgment they are all in point, and in each of them the rule announced as applied to the transaction between Rigor and the Randolphs disclosed by this record,

justifies the opinion we have expressed. It is said also, there was no evidence that Rigor was insolvent at the time the bill of sale was executed. David Randolph's evidence warrants the inference that Rigor was then in failing circumstances, and Rigor when testifying in his own behalf does not attempt to rebut such inference, or claim to have then had any other property. The court did not err in refusing to permit Rigor to be recalled to testify on the day after both sides had closed their evidence and rested. One of the reasons set up in support of the motion for a new trial, was that the court improperly tried the case without a jury, because he had been counsel in the case of Hall v. Rigor, in a justice's court. We have carefully examined the affidavit and counter affidavit filed, and are satisfied no injury was done appellants by reason of the county judge trying the case by agreement, without a jury. The amount of \$300.06 damages recovered by Simmons was, as we think, the real sum due him from Rigor as shown by the evidence.

No sufficient reason appears requiring us to reverse the judgment and order of the County Court, and the same are affirmed.

Judgment affirmed.

H. C. MITCHELL AND JOHN T. MCAULLY

V.

FLORA HINDMAN, BY NEXT FRIEND, ETC.

47	431
150	538
47	431
56	567
47	431
72	580

Malpractice—Evidence—Instructions.

1. No point can be made as to the sustaining of an objection to a given question, where the same question was thereafter answered in substance without objection.

2. It is not necessary to be stated in the plaintiff's instructions in a given case, that he is required to prove his case by a preponderance of the evidence; it is for the defendant, if desired, to lay down the formal rule of law as to the preponderance of the evidence.

3. An instruction on behalf of defendants, stating that "the jury

are instructed, on behalf of the defendants, that the plaintiff in this case is bound to prove to the *satisfaction* of the jury by a *clear* preponderance of the evidence," etc., should not be given.

4. In an action for malpractice this court holds that the condition in question did not result from the injury, but from the failure of the surgeons to use ordinary skill and care in the treatment thereof, and that the judgment against them can not be disturbed.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Jackson County; the Hon. O. A. HARKER, Judge, presiding.

Messrs. F. M. YOUNGBLOOD and N. H. Moss, for appellants.

Mr. WILLIAM A. SCHWARTZ, for appellee.

MR. JUSTICE SAMPLE. On the 16th day of December, 1889, the appellee, then twelve years of age, while attending school at Carbondale, fell, and received what is called a Colles fracture of the radius of the left forearm, about one and one-half inches above the wrist joint. The appellants, being in partnership in the practice of medicine and surgery at Carbondale, were employed to attend the patient. Drs. McAully and Lee reduced the fracture, put the arm in a Levis splint made of tin, of adult size, and bandaged the arm. After that time Dr. Lee did not treat the patient, he being called in, as understood, to assist Dr. McAully in the absence of Dr. Mitchell. The appellants thereafter had exclusive charge of the case, and visited the patient frequently.

The declaration avers that the appellants so unskillfully and negligently performed their duty as such surgeons and physicians, that the injured arm became permanently disabled. On a trial before a jury, a verdict was obtained against appellants, which was sustained by the court.

The errors assigned, that are discussed in the argument, relate, first, to the rejection of proper evidence; second, to

the giving of improper instructions for the appellee, and the refusal to give proper instructions asked on behalf of appellants, and third, to the refusal of the court to grant a new trial on the ground that the verdict is contrary to the weight of the evidence.

The evidence proposed to be introduced, to which it is claimed an objection was erroneously sustained, was whether Doctor McAully had used his best skill and judgment in the treatment of the injury. The record shows that while an objection was sustained to the question bearing on that subject in the form as put, yet thereafter the same question in substance was answered without objection.

There was no error in the giving or refusing instructions. Those given on behalf of appellee, only hold the appellants to the use of ordinary skill, ability and care. The objection is made that they do not lay down the rule of law that the appellee was required to prove her case by the *preponderance* of the evidence. This is not required to be so stated in the plaintiff's instructions. The rule is implied in the statement in the instructions. "If you believe from the evidence." It is for the defendant, if desired, to lay down the formal rule of law, as to the preponderance of the evidence.

In the third instruction given on behalf of defendants it was stated that, "Unless the plaintiff proves by a *preponderance* of the evidence that they, the defendants, did not possess that degree of skill ordinarily possessed by members of the profession, or exercise it in their treatment of the fracture herein, you should find for the defendants."

The instruction offered on behalf of the defendants as to the character of proof required, and refused by the court, of which complaint is made, was clearly bad. It was, "The jury are instructed, on behalf of the defendants, that the plaintiff in this case is bound to prove, to the *satisfaction* of the jury, by a *clear* preponderance of the evidence," etc. This instruction is defective in the use of the words italicized.

The seventh instruction given on behalf of appellees, in

regard to what is to be considered in arriving at a conclusion as to which side has the preponderance of the evidence, is subject to some criticism, but, from the language used, it is not thought the jury would obtain the idea that the evidence of expert witnesses was to be excluded, or not considered. It concludes as follows: "It is for the jury to determine, from the evidence and circumstances before them, whether the defendants were negligent in the treatment of the plaintiff for a fracture of her arm."

Most stress is laid on the claim that the evidence does not support the verdict and judgment.

There is no claim that the fracture itself was not properly reduced, or that the result, in that respect, was not satisfactory.

Specifically, the charge is that the hand was so tightly wrapped with bandage, and so kept for so long without change, that, through lack of circulation, ulcers formed, the flesh gangrened and sloughed off, and thereby the appellee has, practically, lost the use of her hand.

While this record is quite large, the issue is narrowed to the following: Is the present condition of the appellee's hand the result of the injury—the broken radius—or is it the result of the surgeon's failure to use ordinary skill and care in the treatment of the injury? That the hand itself of appellee is seriously, if not permanently, injured, is clearly proven. She can not flex her thumb or fingers so as to grip anything. What caused that condition? The proof shows that the bandage was left on the hand and arm for about six weeks, the appellee claims without removal, the appellants claim it was twice removed, and at once the same bandage, cotton and splint were replaced. The jury evidently found with appellee on the question, and we are not disposed to differ from them, in view of all the facts and circumstances disclosed by the evidence.

The proof is that the appellee complained of the injury, and that she was so ill from the effects of the pain that she frequently had to retire to her bed. It is altogether probable that the pain was caused by the tight bandaging and not

Mitchell v. Hindman.

from the broken bone. In fact, the disclosure of pus and large sores on the hand when the bandage was removed shows that the pain did not arise from the injury itself. There does not seem to be any reasonable excuse for allowing the hand to get in the condition disclosed by the evidence in this case. The appellants were frequently at the house of appellee's father, attending him and another child in sickness, shortly after the injury to appellee, and had every opportunity to observe the condition of the hand. It is inconceivable that the sores described by the witnesses were mere bed sores, or developed in a few days' time into the condition the proof discloses.

These appellants probably are skilled in their profession but in this instance the evidence shows they did not observe that care or use that skill imposed on them by law. They were intrusted with a grave responsibility, the proper discharge of which was far-reaching in its consequences. The law will not permit them to be neglectful in the discharge of that duty, with impunity, whereby such serious consequences may result, as disclosed by the evidence in this case. The evidence in this case does not impress the mind that there was a lack of skill or judgment but a lack of care and attention. The suggestion of counsel for the appellants that the flexor and extensor tendons that extended over the wrist and served to operate the thumb and hand, became imbedded in the soft matter thrown out about the fractured bone, which, when hardened, produced partial paralysis, is not considered to be supported by the evidence. Such a result might possibly occur, but it would be so unusual and exceptional that before the impairment of the use of the hand, such as is disclosed in this case, would be attributed to such a cause, there would have to be no other to which it could be reasonably ascribed.

The judgment is affirmed.

Judgment affirmed.

47 436
58 216

THE WABASH RAILROAD COMPANY

V.

GEORGE B. SANDERS.

Railroads—Nuisance—Insufficient Culvert—Deposit of Coal Slack on Farm Land—Par. 5, Sec. 20, Chap. 114, R. S.

1. Par. 5, Sec. 20, Chap. 114, R. S., applies to roads constructed after that act went into effect.

2. The liability of a grantee of land with a nuisance upon it, for maintaining the same, only arises after notice to abate it.

3. It can not be held that damaging of lands by overflowing them is a "taking" within the meaning of the constitution, and therefore one owning the lands may not have such damages assessed as for a "taking" as against *any one* owning the road.

4. Under the rule that the pleading is to be taken against the pleader, it can not be assumed in the case presented that the defendant created the nuisance by the construction of the railroad, or was requested to abate it, the declaration averring a nuisance, consisting of the maintenance of an insufficient culvert across an arm of a stream, whereby, during a freshet, coal slack was deposited on plaintiff's land, there being no averment as to when or by what railroad company the culvert and embankment were constructed, or that appellant was notified to abate the same; said slack having been washed from the embankment.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Madison County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. GEORGE B. BURNETT, for appellant.

Messrs. HADLEY & CURTON, for appellee.

MR. JUSTICE SAMPLE. The declaration in this case alleges that appellant maintained a nuisance, whereby appellee was injured. The nuisance consisted in maintaining an insufficient culvert across an arm of Indian creek, whereby, during a freshet, the coal slack that was in the embankment of the road on each side of the culvert, was washed out, carried

down the stream a short distance by the flow of the water, and deposited on appellee's land, to its great damage, as well as to the crops growing thereon.

There was no averment as to when or by what railroad company, the culvert and embankment were constructed, or that appellant was notified to abate the same.

For want thereof appellant interposed a demurrer, which was overruled by the court. Appellant elected to stand by its demurrer, whereupon, on hearing, judgment was rendered for appellee in the sum of \$200, from which this appeal is prosecuted.

The sole question is as to the sufficiency of the declaration. Under the rule that the pleading is to be taken against the pleader, it can not be assumed that the appellant created the nuisance by the construction of the road, or was requested to abate it. *Groff v. Ankenbrandt*, 124 Ill. 51.

It is said, however, by appellee's counsel, that "each overflow caused by the use of the road, as charged, was a new nuisance, a continuing trespass, for which appellee had a right of action for his damages;" and the case of *C., B. & Q. R. R. Co. v. Schaffer*, 124 Ill. 121, is cited in support of that proposition.

The proposition of counsel that the overflow was caused by the use of the road is not averred in the declaration, nor supported by the facts therein alleged. The cause of the damage is alleged to be, first, the inadequacy of the culvert; second, whereby the coal slack in the embankment was carried off and deposited on appellee's land. Therefore, necessarily, the cause of the damage was in the construction of the road, and not in its operation, and the real complaint reaches back to that original act.

The *Schaffer* case, *supra*, relates to an original negligent construction of a bridge across a stream, whereby water backed up and overflowed Schaffer's land. He obtained a judgment for damages on account of an original unlawful construction of the bridge. His land thereafter having been damaged by *another* overflow of water, he brought another action, which is the one cited. The defense was that the

first recovery was a bar. The court say, page 120, that such defense assumes that the unlawfully constructed bridge would be permanent, and that the railroad company, *having done a wrong*, intended to continue in such wrong doing. Under such a state of facts the court holds that the railroad company having originally created a nuisance by its negligent acts, the maintaining it, after one recovery, was regarded as a new nuisance. It also holds as a fact that Schaffer did not, in the first suit, recover damages as for a *permanent* injury, and he had a right to assume, as to such a cause of injury, that it would be corrected and the nuisance abated by the company.

The O. & M. Ry. Co. v. Wachter, 123 Ill., at page 445, cited by appellee, has reference to a negligent construction by that company, and what is there said about maintaining a nuisance, has reference to that fact. The point there made by the company was, that all damages that could arise to the land of Wachter, were included in the original compensation paid on the "taking."

The court holds that doctrine only applies when the original construction was proper, as damages for the taking of the land, under the act of eminent domain, are assessed on the assumption of a proper construction.

It does not hold, as counsel suggest, that such damaging of lands by overflowing them is a "taking" within the meaning of the constitution, and, therefore, one owning the lands may have such damages assessed as for a "taking" as against any one owning the road; for it is said such damaging of the land is "not a taking in the limited sense in which that term is used in our statute."

It is also contended that Par. 5, Sec. 20, Chap. 114, R. S., imposed the duty on appellant to keep in repair culverts sufficient for the free passage of water in watercourses over any railroad which it might operate, regardless of the time of its construction.

This section shows that it applies to roads constructed after that act went into effect, and there is no averment when the appellant's road was constructed. What is more

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material, however, is the view that the imposition of a statutory duty not to create or maintain a nuisance, is only declaratory of the common law, applicable not only to railroad corporations, but to individuals as well. It was as applicable in the Groff case as in this. But as to a grantee of land with a nuisance on it, his liability for maintaining it only arises after notice to abate it.

Under the authority of the Groff case, in the absence of an averment that appellant constructed the road, or that it maintained the nuisance after notice to abate the same, there can be no recovery.

The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

CITY OF OLNEY

V.

W. J. TODD AND PHILLIP TODD.

Licenses—Municipal Ordinance—Traveling Salesmen—Peddlers.

1. A peddler is a person who travels about the country with merchandise for the purpose of selling it—an itinerant vender of small wares which he carries with him for sale.

2. In an action wherein certain defendants were charged with violating a municipal ordinance by peddling in a given city without a license, this court holds that the evidence did not show them to be peddlers, and affirms the judgment in their favor.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Richland County; the Hon. C. C. Boggs, Judge, presiding.

Mr. R. S. ROWLAND, for appellant.

Mr. R. B. WITCHER, for appellees.

MR. JUSTICE GREEN. Appellees were charged with a violation of a city ordinance of the city of Olney, by peddling in said city without a license. The cause was tried in the Circuit Court, on appeal from a justice's court. By agreement of parties a jury was waived. The court found the issue for defendants, and the city took this appeal.

The evidence establishes the following facts: That appellees were traveling salesmen for "Ross Bros.," wholesale dealers, doing business in Terre Haute, Indiana. That on or about March 25, 1892, one of the Todds, while so employed, came to Olney with samples of lace curtains, exhibited them to various persons, from whom he solicited orders and took orders from three of these persons, each for one pair of curtains. He delivered no goods and was paid no money. The orders were accepted and the curtains were shipped from Terre Haute, via the American Express Company, to Olney, about two weeks thereafter, at which time the other defendant came to Olney, received the goods from the express company, delivered to each of said purchasers the curtains ordered, and took the pay therefor. Two material questions, are submitted to us to determine as we view the case, viz.: Who is a peddler? And were the defendants peddlers within the meaning of the law? A peddler is a person who travels about the country with merchandise for the purpose of selling it; an itinerant vender of small wares which he carries with him for sale; a traveling trader, one who carries small commodities about on his back, or in a cart, or in a wagon, and sells them. In the opinion in *Emmons v. Lewiston*, 132 Ill. 380, it is said: "It has never been understood by the profession, or the people, that one who is ordinarily styled a "drummer"—that is, one who sells to retail dealers, or others by sample, is either a hawker or peddler." Under the facts proven, neither of the defendants were peddlers within the meaning of the law, and hence had not been guilty of violating said ordinance by reason of any act done by either of them, proven at the trial in the Circuit Court. Cerro

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Gordo v. Rawlings, 135 Ill. 36; Emmons v. Lewiston, *supra*; Delisle v. Danville, 36 Ill. App. 659; Rawlings v. Cerro Gordo, 32 Ill. App. 215.

The finding was right, and the judgment of the court below is affirmed.

Judgment affirmed.

JAMES SMITH

V.

B. M. LEADY.

Contracts—Sale of Boarding House Business—Promise not to Compete—Breach.

1. Parol evidence should not be admitted to show the terms of a given contract, when there is an obtainable writing in existence covering the same point; nor of a parol agreement relating to the subject-matter of the writing.

2. A contract not in general restraint of trade but only in partial and particular restraint thereof, where the consideration is adequate and the restriction is reasonable, is not void as being against public policy.

[Opinion filed June 26, 1893.]

IN ERROR to the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Messrs. L. H. HITE and M. MILLARD, for plaintiff in error.

Messrs. E. R. DAVIS and A. FLANNIGAN, for defendant in error.

MR. JUSTICE GREEN. B. M. Leady brought this suit against James Smith and wife, to recover damages for the breach of an alleged contract. After suit was commenced, the wife died, and as to her, the suit was abated. The jury found a verdict for plaintiff and assessed his damage at

§300. Judgment for that sum, and costs, was entered against Smith, and he sued out this writ of error. The contract averred is, that in May, 1891, defendant sold to plaintiff, for \$750, the furniture and boarding-house equipments in a house in East St. Louis, and the interests in the boarding-house business, and in consideration of said sale and receipt of \$750, defendant then and there agreed with plaintiff not again ever to enter into, or carry on, a boarding-house business in said city.

The breach alleged is, that defendant, within one month after making contract, again entered into, resumed, and carried on the business of boarding-house keeping in said city. The court erred in admitting incompetent evidence over the objection of defendant, and in denying motions of defendant to exclude such evidence from the jury, and the verdict was not warranted by the evidence.

One of the material averments of the declaration necessary to be proven on behalf of plaintiff, was the sale to him, by defendant, of the boarding-house furniture and equipments. This sale was evidenced by a writing, signed by Smith, describing the articles sold and price paid. The writing was the best evidence of the contract of the parties, and should have been produced and read to the jury, or a sufficient reason shown for the admission of secondary evidence in place of it. But the oral testimony of plaintiff was admitted to prove the contract of the parties, over the objection of defendant, and his several motions to exclude this parol evidence were denied, notwithstanding the plaintiff admitted the bill of sale was in his possession, and gave no reason for not producing it.

Hence, one material averment necessary to the maintenance of the suit was not established by competent evidence, and no recovery could lawfully be had. The oral testimony of plaintiff was also improperly admitted to prove a parol contract of defendant, made contemporaneously with said written contract of sale, not to ever enter into or carry on the business of restaurant keeper in East St. Louis. The effect of this ruling was to allow the admission in evidence,

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and give vitality to a parol agreement in reference to the same subject-matter, made at the same time, with the written one, and which by the settled rules of law must be regarded as merged in the writing. *Strehl v. D'Evers*, 66 Ill. 77; *Conwell v. S. & N. W. R. R. Co.*, 81 Ill. 232; *Keegan v. Kinnoine*, 12 Ill. App. 484, and cases these cited. If all this evidence had been admissible, yet the evidence of plaintiff touching the amount of his damage was quite unsatisfactory, and did not warrant the finding of the jury. For these reasons the verdict ought to have been set aside. Counsel for appellant makes the point that the parol contract not to engage in the restaurant business in East St. Louis was void because it was a contract in restraint of trade and contrary to public policy. The reasons we have given for reversing take this point out of the discussion and dispense with the necessity of deciding it; but we will add to what has been said, that if counsel desired us to decide the question, a demurrer to the declaration and abiding by the demurrer, in case the trial court overruled it, would have effected their purpose; and further, we understand the law to be, that a contract not in general restraint of trade, but only in partial and particular restraint thereof, where the consideration is adequate and the restriction is reasonable, is not void as being against public policy. *Linn v. Sigsbee*, 67 Ill. 75; *Craft et al. v. McConoughy*, 79 Ill. 346; *Talcott v. Brackett*, 5 Ill. App. 60; *Cobbs v. Niblo*, 6 Ill. App. 60; *Stewart v. Challacombe & Ramsey*, 11 Ill. App. 379; *Just v. Greve*, 13 Ill. App. 302.

For the errors we have indicated the judgment is reversed and cause remanded.

Reversed and remanded.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS
V.
THOMAS BRUCE.

*Master and Servant—Negligence of Master—Personal Injury to
Employe—Duty to Inform Servant of Dangers of Service—Coal Mines.*

1. A servant has a right to rely upon his master's compliance with a duty by the law imposed as to the dangers of his employment, and in the absence of notice to the contrary, has the right to conclude that the place in which he is required to work is not dangerous, and that the kind of work he is directed to do, can be safely done without a critical examination of the surroundings.

2. In an action brought to recover for a personal injury, the declaration should not allege that the plaintiff had no notice of a certain condition of things when he was in presence thereof, unless some reason can be assigned why he was not in possession of his senses.

3. The averment of the plaintiff in the case presented, that he used due care and caution in performing the work he was called upon to do, is not negatived by the fact that he did not notice the steepness of a certain grade.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Clinton County; the
Hon. A. S. WILDERMAN, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

Messrs. VAN HOOREBEKE & FORD, for appellee.

MR. JUSTICE GREEN. It is averred in the first count of plaintiff's declaration that defendant owned and operated in Trenton, in Clinton County, a certain coal mine, and before and at the time of committing the grievances complained of, certain parts of said mine were extra hazardous and dangerous for persons unacquainted with the topography of the mine and its conditions. That it was the duty of defendant to inform and notify its employes, on enter-

ing upon their duties in said mine, of the places therein which were extra hazardous and dangerous, before sending them to work in such parts of said mine, and inform said employes of the nature and character of such extra hazard. That plaintiff was employed by defendant to shovel and load coal in said mine, and informed defendant that he, the plaintiff, had but little experience in mines, and had none except in shoveling and loading coal. That after his employment by defendant on January 1, 1891, he commenced in said mine the work of shoveling and loading coal, and continued at such work until February 25, 1891, when he was directed by the defendant to go to a part of the mine with which plaintiff was wholly unfamiliar, and where he had never been, and bring away a car loaded with dirt and standing in the entry near one of the rooms in said mine, and unload it in one of the empty rooms some distance along the entry. That the part of the mine where said loaded car was standing, and along the entry to the place said car was to be unloaded, was extra hazardous and dangerous owing to the steep grade in the entry, of which plaintiff had no knowledge or notice, nor was he informed thereof by defendant.

That plaintiff proceeded with due care and caution to push said car, to move it along the entry to the place of unloading, but could not move it because of some dirt in front of the wheels and he then went in front of the car and proceeded to remove the dirt and then with due care and caution pulled on the car to ascertain if it was free, when it started down said grade, gaining greater velocity as it went. That as soon as it started he endeavored to stop it so that he might get behind it, but owing to the steep grade, and momentum of the car, was unable to do so. That owing to his efforts to stop the car, his light was extinguished and he was left in utter darkness, and being unfamiliar with that part of the mine, and the car moving at great speed, he was unable to get out of the way of it, and was unavoidably struck by the car and thrown against the side of the entry and finally thrown down and greatly injured. The personal injuries

are then specifically described. The second count of the declaration was not relied on by plaintiff and need not be referred to. The plea of general issue was entered and *similiter* added. The jury found defendant guilty and assessed plaintiff's damages at \$2,000; \$500 of this amount was remitted by plaintiff. Defendant's motion for a new trial was overruled, and judgment entered for plaintiff for \$1,500 and costs. The errors assigned are, first, the Circuit Court erred in denying motion for new trial; second, on entering judgment on the verdict. No objections to the rulings of the court during the trial are suggested in the printed argument on behalf of appellant, but it is said the first count sets out no cause of action, because it shows on its face that plaintiff did not exercise any due or proper care. A steep grade can be seen. If this is so, the allegation that plaintiff had no notice of it, when he was where it was, is mere nonsense, unless some reason is alleged why he lost his senses. The count does not allege that his light went out until after he started the car, and even if it had, it would have been gross negligence to attempt to move the car in the dark. If this count is obnoxious to these objections, a demurrer would have reached them, and furnished an effectual means of disposing of the case, without the expense of a trial by jury and preparing a voluminous record for the inspection of this court. But we do not think the count is defective. The particular duty which defendant as master owed the plaintiff as his servant, and for the non-performance of which negligence is charged, is specifically averred, and the facts showing such negligence are set up in apt words. It is also averred that plaintiff used due care and caution in performing the work he was directed to do, and the fact that he did not see the steep grade does not negative the averment. He had a right to rely upon the master's compliance with a duty by the law imposed, and in the absence of notice to the contrary, had the right to conclude that the place of work was not dangerous, and the kind of work he was directed to do there could be safely done without a critical examination of the surroundings.

City of Murphysboro v. Woolsey.

The additional points suggested on behalf of appellant, are, that there was no evidence showing, or tending to show, that appellant owned or operated the mine in which appellee was injured, and no evidence which showed or tended to show that appellee was ever in the service of appellant, and no evidence directly or remotely connecting appellant with appellee's injury. Testimony of appellee, Gaffner, Adamson, McDonald and Eckleberger, not only tended to prove appellant owned and operated said mine at the time of appellee's injury, but justified the jury in finding such to be the fact, and testimony of all of said witnesses, except Gaffner, tended to show and warranted the jury in finding appellee was in the service of appellant, as averred in the declaration. The evidence established the material facts averred, the injuries to plaintiff and the negligence of appellant by means of which such injuries were occasioned. The judgment is affirmed.

Judgment affirmed.

CITY OF MURPHYSBORO

V.

HARRY WOOLSEY, BY NEXT FRIEND, ETC.

Municipal Corporations—Negligence of—Personal Injuries—Fall from Elevated Sidewalk—Infant—Contributory Negligence of Mother of.

1. A municipality is bound to keep and maintain its sidewalks in a reasonably safe and suitable condition for the use of pedestrians, and a failure to perform this duty is negligence, creating primary liability to respond in damages to one injured by reason of such negligence.

2. This court holds that there is nothing in the contention of defendant in the case presented, that it is not liable because the mother of the infant injured pushed it, whereby it fell from the sidewalk, the evidence not establishing such contention, it appearing that such walk was not protected by a railing or other guard.

3. The suit in question having been brought by a child to recover damages himself for injuries received by him, the negligence or want of care of the parent in charge of him alleged to have contributed to the

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83	523

accident does not exonerate the defendant, nor bar the plaintiff's right to recover.

4. Eleven months is ample time for a municipality to ascertain that one of its sidewalks is unsafe, and to put it in proper condition.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding.

Messrs. R. P. MARTIN, City Attorney, and R. T. LIGHTFOOT, for appellant.

Messrs. A. B. GARRETT and W. A. SCHWARTZ, for appellee.

MR. JUSTICE GREEN. This suit was brought to recover damages for personal injuries to Harry Woolsey, a minor, occasioned by a fall from an elevated sidewalk in the city of Murphysboro. It is averred in the declaration that appellant carelessly and negligently kept and maintained its plank sidewalk in a slanting position for a distance of forty feet and elevated five feet above the surface of the ground, without banisters or railing on either side. That by reason of such unsafe condition of the walk, appellee, while passing along and upon the same, slipped and fell therefrom to the ground, and thereby his right arm was broken and other injuries were sustained by him. The jury found defendant guilty and assessed plaintiff's damages at \$300. Judgment was entered on the verdict and defendant appealed. It appears from the evidence that the sidewalk in question was on a public street in the city of Murphysboro, over and along which many persons traveled daily. The walk was built of plank and was about four feet wide. At one end it was elevated five feet above the surface and extended along for forty feet, with a gradual slope to the level of the ground, at the other end. It was supported on trestles, and was without railing or any guard on either side, to prevent persons falling therefrom. It had been maintained in this unsafe condition for at least eleven months next preceding the accident, and the city officials had ample time,

exercising that reasonable diligence the law requires, to discover that it was unsafe for public travel and to put it in safe and suitable condition. The duty of appellant to keep and maintain its sidewalks in reasonably safe and suitable condition for the use of pedestrians, is imposed by law, and a failure to perform this duty is negligence, creating primary liability to respond in damages to one injured by reason of such negligence. The evidence in this record establishes the fact that appellant was guilty of the negligence charged in the declaration.

It further appears that appellee, a child five years old, was, with his mother, walking upon this walk, and when about midway of the forty feet distance, fell therefrom to the ground and received the injuries complained of. Appellant contends, however, that even if the negligence and injury is proven, yet the contributory negligence of appellee's mother, who had him in charge at the time of the accident, occasioned the injury and barred his right to recover. No negligence is imputed to the child, but it is claimed the mother pushed the appellee from the edge of the sidewalk so as to place him in front of her near the center of it, and thus caused appellee to lose his balance and fall off.

If the evidence supported this claim the jury could still fairly find the negligence of the appellant was the proximate cause of appellee's injury. In the case of Village of Carterville v. Cook, 129 Ill. 152, Cook, the appellee, while walking over an elevated sidewalk, unprotected by railing or other safeguard, was accidentally pushed off by another boy and fell to the ground, receiving severe injury. It was claimed by appellant that the proximate cause of the injury was the act of the boy who pushed appellee off, and not the negligence of appellant. Touching this claim it is said in the opinion, if a person while observing due care for his personal safety, be injured by the combined result of an accident and the negligence of a city or village, and the injury would not have been sustained except for such negligence, yet, although the accident be the primary cause of the injury, if it was one which common prudence and sagac-

ity could have foreseen and provided against, the negligent city or village will be liable for the injury. In the case at bar the jury might well have found the injury would not have occurred, if railing or other safeguard had been maintained, even if appellee had been pushed and lost his balance as claimed.

Again, it appears this suit is brought by a child to recover damages himself for injuries received by him, and the negligence or want of care of the parent in charge of him, contributing to the accident, does not exonerate the appellant, nor bar appellee's right to recover. *Ryan v. C. W. C. Ry. Co.*, 31 App. Rep. 622; *Chicago C. Ry. Co. v. Wilcox* 33 App. Rep. 452, and cases there cited. In *Village of Carterville v. Cook*, *supra*, the court say: "It is not perceived how, upon principle, the intervention of the negligence of a third person over whom neither the plaintiff nor the defendant have any control, can be different in its effect or consequence in such cases, than the intervention of an accident having a like effect. The former, no more than the latter, breaks the casual connection of the city or village with the injury. The injured party can no more anticipate the one than the other."

If this were a suit brought by parents or next of kin, to recover for the death or injury to a child, a different rule would obtain. So far we have discussed this contention of appellant upon the theory that appellee was pushed by his mother, and in consequence lost his balance and fell, but we desire to say further that such fact was not satisfactorily established by the evidence.

Taking all the instructions given as a series, they were more favorable to appellant than the law warranted, and the evidence sustained the verdict. The judgment is affirmed.

Judgment affirmed.

Tanquary v. Walker.

SARAH A. TANQUARY
V.
E. M. WALKER AND ALMA FLY, COPARTNERS.

Statute of Frauds—Mechanics' Liens.

1. To be valid, a promise by one to pay the debt of another, must be in writing.
2. The lien law does not operate to make the debt of a contractor the debt of the owner of the building.
3. The promise of a property owner to supply-men to pay the bills of contractors, does not prevent the supply-men, as a matter of law, from enforcing their lien.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Jefferson County;
the Hon. E. D. YOUNGBLOOD, Judge, presiding.

MR. WILLIAM T. PACE, for appellant.

MR. ALBERT WATSON, for appellees.

MR. JUSTICE SAMPLE. The appellant contracted with Ferguson & Cochran, to construct her a dwelling house complete, for \$700. They contracted with E. M. Walker & Co., the appellees, for the lumber for the house.

By May 1, 1891, the appellees had furnished to Ferguson & Co. lumber for such house of the value, as charged on appellee's books, of \$357.22.

On that day appellant, with her daughter, went to appellees' place of business to settle a small bill of her own, of the amount of \$5.90, which she paid and obtained a receipt in full. While there she inquired if Ferguson & Co. had paid appellees on the lumber the last \$100 which she had paid to them, when appellees' agent replied that the money had been paid, but all of it except \$3.62, had been credited on another bill or account of Ferguson & Co.

At this point a conversation took place which is the subject of dispute. Appellees contend that appellant then promised to pay for all materials that went into her house, upon which promise it is claimed they relied, and did not take out a lien in consequence thereof. Appellant denies such promise and is corroborated in such denial by her daughter, who was present at the time. Appellant's version of the conversation is, that she stated that thereafter she would see to the application of the money as it became due to Ferguson & Co.

After that time she paid to appellees \$100 on May 14, 1891, \$75 on August 11th, and \$100 thereafter, making a total of \$275. She had before that time paid Ferguson & Co. \$155.

The total amount of lumber furnished to Ferguson & Co. by appellees that went into the construction of appellants' house was of the value of \$428.40, so that after such conversation on May 1, 1891, \$71.18 worth of lumber was furnished by appellees. The account of this lumber was kept on the books of the appellee as follows: "Ferguson & Co. in account with Walker & Co. for Tanquary."

There is no pretense that, originally, credit was extended to the appellant, or that the lumber furnished prior to May 1, 1891, was sold to her, or on the faith of her promise. Therefore, it is clear that the \$357.22 was within the statute of frauds, even if she did promise to pay it, which promise is not considered sustained by the evidence, in view of all the facts and circumstances. If, however, it should be conceded that the promise was made, the money subsequently paid was paid generally, and she would have a right to have it first applied on the \$71.18, for which, on the theory that that amount of lumber was furnished on the faith of such promise, she would be liable. As to the residue of such account, that promise would be collateral, and therefore she would not be liable, as it was a promise to pay the debt of another, and not in writing. *Owen v. Stephens*, 70 Ill. 463. The fact that the appellees, under the law, would have a lien on appellant's house for such claim, does

Howard v. Howard.

not take the case out of the statute of frauds. That is a special statutory proceeding to which the appellees could resort or not, as they desired, if they first complied with the law. That law does not operate to make the debt of the contractors the debt of the appellant. Besides, the promise in no way prevented, as a matter of law, the appellees from enforcing their lien. The authorities, cited by appellee's counsel on this point, have been examined, and are not considered as contravening the principle of law above announced.

The judgment is reversed and the cause remanded.

Reversed and remanded.

KATE HOWARD
v.
GEORGE HOWARD.

Separate Maintenance—Divorce.

In view of the evidence in the case presented, wherein a wife filed a bill for separate maintenance, and her husband filed a cross-bill for divorce, this court declines to interfere with a decree dismissing both bills.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

Messrs. G. & G. A. KOERNER and FRED B. MERRILLS, for appellant.

Messrs. DILL & SCHAEFER, for appellee.

MR. JUSTICE GREEN. Kate Howard filed a bill for separate maintenance against George Howard, who thereupon filed a

cross-bill for divorce. The court below dismissed both bills. The court evidently found that appellee was a drunken, worthless man, who at times was cruel, and that appellant gave him cause, by her improper conduct, to gravely complain.

The court had the parties before it and could better judge than we, of the credibility of the evidence. In addition to this, appellee has nothing in the way of property to contribute to her support and the evidence does not indicate that he ever will have. The decree is affirmed.

Decree affirmed.

WILLIAM STEINHOFF, RECEIVER,
V.
ELECTRIC LIGHT AND POWER COMPANY OF CENTRALIA.

Contracts—Electric Light Plant—Improper Work—Set-off.

1. Where damages occasioned by the failure of a given firm to carry out an agreement, forms the subject-matter of defense set up in pleas of set-off, if the averments of such pleas are proven, any excess over the amount of plaintiff's claim in an action brought to recover thereon can be recovered. The effect of proving the averments of a plea of recoupment will be to merely defeat a recovery by such plaintiff.

2. A verbal contract can not change the terms of a previous written contract duly entered into, or absolve a party thereto from the performance of its terms.

3. In an action brought upon a contract touching the construction of an electric light plant, this court holds that the amount of defendant's damages, as established by the evidence, arising from the use of unsuitable material and from improper construction, exceeded the amount of plaintiff's claim proven, and that the judgment for the defendant must be affirmed.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Marion County; the Hon. B. R. BURROUGHS, Judge, presiding.

Steinhoff v. Electric Light & Power Co.

Messrs. EDMOND A. B. GARESCHÉ and WILLIAM F. BUNDY, for appellant.

Messrs. SAMUEL L. DWIGHT and FRANK F. NOLEMAN, for appellee.

MR. JUSTICE GREEN. This was a suit in assumpsit by appellant as receiver of the Western Electrical Supply Company against the Electric Light and Power Company, of Centralia, Illinois, to recover for work and labor, materials and appliances, used and employed in the construction of an electric light plant at Centralia, and for the expenses of T. J. Wilson for several trips from St. Louis to that place and return, during January, February and part of March, 1891.

The defendant filed a plea of general issue, two pleas of set-off, and two pleas of recoupment. Several replications were interposed to each of the pleas of set-off and recoupment, traversing the material averments in each. Rejoinders were filed to the eleventh and twelfth replications, and the other replications traversed and issue joined. The rejoinders were traversed and issue joined and a *similiter* was added to the general issue. Upon these issues the cause was submitted to a jury, who returned a verdict for defendant. Plaintiff's motion for a new trial was overruled and judgment against plaintiff for costs was entered. The "Western Electrical Supply Company" was located in St. Louis. It was not a corporation but a co-partnership, called by that name. The only members thereof were appellant and one T. J. Wilson. It was engaged in the business of furnishing supplies for electric light plants, and superintending the construction thereof for those who purchased such supplies of the firm, to be used in constructing and completing plants in towns and cities. On November 24, 1890, this firm entered into a written contract with appellee, by the terms of which the firm agreed to select, furnish and deliver to appellee in Centralia, Illinois, a suitable and sufficient engine, dynamo, and all material necessary

to complete the main line, and an entire electric plant, with all connections and necessary materials pertaining thereto, including transportation and labor, and complete the plant, and have twenty-five street lamps in operation within ninety days. Appellee was to pay \$2,400 in five days after the dynamo was started, balance to be paid by four notes, maturing in six, twelve and eighteen months, with eight per cent interest, and secured by mortgage on the plant, and as a consideration for the services of the firm in making selection of a suitable engine, dynamo and material for the plant and directing and superintending the construction thereof, appellee was to pay to said firm ten per cent profit in addition to the cost, on the gross amount expended for labor, transportation, and materials, and it was also provided the construction of the entire plant should be under the exclusive control of the firm.

By the terms of this contract, as we construe it, the Western Electric Supply Co. undertook and agreed to construct complete and deliver to appellee, within a specified time, an electric light plant, properly constructed of proper materials and furnished with all necessary machinery and appliances, and in a condition to be successfully operated. Wilson was represented to be and claimed to be, an expert, possessed of knowledge and experience sufficient to carry out and fulfill the undertaking and agreement of the firm as provided in the contract. He selected the machinery, materials and appliances, directed and superintended the construction of the plant and continued in control thereof during January, February and until March 6, 1891, when he left and never returned. At the time he abandoned the work, the plant was in a defective condition, by reason of the use of unsuitable and insufficient machinery, materials, and appliances selected by Wilson, and by reason of its faulty construction. To remedy these defects and put the plant in such a condition that it could be successfully operated, appellee was necessarily compelled to, and did, expend a large sum of money. Damages thus occasioned by the failure of the firm to fulfill and carry out the agreement

made by it, forms the subject-matter of defense set up in the pleas of set-off and recoupment. These pleas presented proper defenses, under the plea of set-off. If the averments of the plea were proved, an excess over the amount of plaintiff's claim could be recovered, while the effect of proving the averments of a plea of recoupment would be to merely defeat a recovery by plaintiff. *McCarthy v. Ney*, 91 Ill. 127, was a suit to recover balance claimed to be due on a contract. Defendant asked leave to file plea of set-off, averring breach of condition of contract and offering to set off the damages so occasioned. The trial court refused to allow the plea to be filed. In the opinion of the Supreme Court, it is said, the plea was necessary in order to recover balance of damages claimed. It does not suffice that defendants might, under general issue, recoup their damage to the extent of preventing any recovery by plaintiffs and have a new suit for any excess. As the whole question of damages would have to be gone into in this suit, it would be fit that full recovery for them should be there had and all litigation in respect to them ended. See also *Tully v. Excelsior Iron Works*, 115 Ill. 545; *Cox v. Combs*, 17 Ill. App. 504; *Spencer v. Dougherty*, 23 Ill. App. 399; *Bross v. C. & V. R. R. Co.*, 9 Ill. App. 363; *Streeter v. Streeter*, 43 Ill. 155; *Scott v. Kenton*, 81 Ill. 96.

Appellant contends, however, that neither of the pleas was supported by the proof. That the work and labor, materials, appliances and expenses sued for, were not furnished under said written contract nor subject to its conditions, but under a subsequent verbal contract between the parties, and had been so furnished after the plant had been accepted by appellee. That even if damages could be properly allowed appellee for breach of the conditions of the written contract, yet the amount of such damages established by the proof did not equal the amount of plaintiff's claim proven; hence the verdict and judgment should have been for plaintiff. A careful examination of the evidence satisfies us that neither of these contentions is tenable. The subsequent verbal contract did not change the terms of the written con-

tract or absolve the firm from the performance of its conditions, but all the items sued for were furnished under Wilson's direction and supervision in January, February, and up to March 6th, to be used in accomplishing the purpose of the written contract as contemplated by both parties, viz., the construction, completion and delivery to appellee by said firm of a properly constructed electric light plant in suitable and fit condition to be successfully operated; and the items of expense claimed in the bill of particulars attached to pleas of set-off, as well as the damages averred in the pleas of recoupment, evidently grew out of and were connected with the same subject-matter—the materials furnished for, and construction of, this electric light plant, and the preponderance of the evidence shows the plant was not accepted by appellee. The proof supported the pleas, and the amount of appellee's damages as established by the evidence exceeded the amount of plaintiff's claim proven.

No error is perceived requiring us to reverse the judgment and it is affirmed.

Judgment affirmed.

47 458
150s 212

JACOB KOCH ET AL.

V.

AMBROSE ROTH.

Sales—Vendor's Lien—Practice.

1. In view of the evidence, this court declines, in the case presented, to interfere with the decree for the complainant granting a vendor's lien on certain real estate for unpaid purchase money.

2. This court likewise holds that the trial court properly allowed complainant to file an amended bill after the evidence was introduced and arguments heard.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. A. S. WILDERMAN, Judge, presiding.

Koch v. Roth.

The amended bill in this case was filed by Ambrose Roth, and it is therein alleged that he was the owner and in possession of certain lots in the village of New Athens, St. Clair County, and on September 23, 1891, sold said premises to Jacob F. Koch for \$13,000, and together with his wife, by their warranty deed of that date, conveyed said real estate to Koch. That on said date he also sold to Koch, for \$1,000, all the personal property belonging to complainant's beer brewing business, consisting of horses, wagons, beer truck, kegs, tools, etc., and on the day he made such sale it was agreed between complainant and Koch, that said sums of \$13,000 and \$1,000, should be paid as follows: \$2,000 in shares of a brewing company, to be delivered to complainant as soon as said brewing company was organized, and balance be by Koch applied on the then existing debts against complainant, including a debt secured by mortgage on said lots. That on September 24, 1891, complainant delivered to Koch possession of all said real and personal property, and on September 30, 1891, received said \$2,000 in shares. That by said agreement complainant's said debts were to be paid to his creditors forthwith by Koch. That Koch had notice who the creditors were, and that the debts amounted to \$12,000, but has neglected and refused to pay the debts to said creditors. That Koch conveyed by deed, dated September 26, 1891, all of said real estate to the New Athens Brewing Company, and it is now the owner of the same. That Koch and Isidore Probst are members of said brewing company, and the latter, before their purchase, had full knowledge that the purchase money due from Koch had not been paid as herein set forth. That complainant has no security for the purchase money so unpaid by Koch except by the enforcement of a vendor's lien on the premises so sold. That \$1,000 in shares, received, he has applied in payment for the personal property sold, and the other \$1,000 as so much paid on the said \$13,000 purchase money, and the balance thereof, \$12,000, with five per cent interest thereon, remains due and unpaid.

That no persons other than the New Athens Brewing

Company, Jacob Koch and Isidore Probst, have any interest in said premises, or in this suit; makes all of them parties defendant; prayer that complainant be decreed to have a lien for the unpaid purchase money and interest on said lots. That Koch be directed to pay the amount found due by a short day, and in default of such payment said lots be sold for the amount found due and costs, and for other and further relief. By the decree the court finds complainant was owner in fee simple of said lots on September 23, 1891. That said lots were subject to a mortgage securing \$5,000 debt from complainant to Christine Hoos. That complainant, on said date, was the owner and in possession of said personal property as alleged. That on said date complainant bargained and sold said lots for \$13,000, and said personal property for \$1,000 to said Jacob Koch. That at the time of said bargain and sale it was agreed by complainant and Koch that the latter, in payment of part of the purchase money, assume the payment of the \$5,000 mortgage debt. That complainant receive twenty shares of the stock of the then to be formed "New Athens Brewing Company," each share of the face value of \$100, and the remainder of the purchase money to be applied to the payment of the then existing debts of the complainant. That afterward on said date, in pursuance of said bargain and sale, complainant and wife, by warranty deed conveyed, and then and there delivered possession of said lots, together with said personal property, to Koch. That complainant received said twenty shares of stock and applied ten to the payment of the \$1,000 purchase money of said personal property, and ten have been applied as so much paid on the purchase money of said lots. That on the day of sale the mortgage debt amounted to \$5,180, and the balance of complainant's debts then existing was \$7,652.54, all of which debts have been discharged by the payment of \$4,415.27 by the defendants to the creditors of complainant. That of the purchase money there remains in the hands of Koch \$2,584.73, and he has failed and refused to pay that sum to complainant. That said New Athens Brewing Company was

Koch v. Roth.

organized October 1, 1891, and said Koch and Probst are members thereof, and were then, and ever since, officers controlling and managing the business. That said brewing company had full notice of the manner and the mode the purchase money was to be paid, and had full knowledge that \$2,584.73 of the purchase money had never been paid; and with that knowledge Koch conveyed said lots and sold said personal property to said brewing company, who took possession thereof. That complainant has no security for the unpaid purchase money which, with interest at five per cent from September 23, 1891, amounts to \$2,712.78, now due the complainant, and for which he is entitled to a lien on said lots subject to said mortgage. It was further decreed that complainant have a vendor's lien for that sum on said lots, subject to the lien of said mortgage; that Koch pay to complainant that sum with five per cent interest thereon, from the date of decree, and the costs, within thirty days, and in default thereof the master in chancery shall sell, subject to said mortgage, all title and interest of defendants in and to said lots, or so much thereof as shall be necessary to pay said sum and interest, and costs, and expenses of sale. The time, place and terms of sale is fixed, and publication thereof and of description of property to be sold, as required by law, is ordered, and the issuance of certificate to purchaser and the execution and delivery of deed to purchaser, in case the property is not redeemed, is ordered. It is further decreed that out of the proceeds of the sale the master pay the costs, the expense of sale, and then pay to complainant the amount due him with five per cent interest thereon from December 15, 1892, the date of decree.

Mr. CHARLES P. KNISPEL, for appellants.

Messrs. HAY & WINKELMANN, for appellee.

MR. JUSTICE GREEN. The first point in appellants' printed argument is, that the court erred in allowing complainant

to file an amended bill at the hearing, after the evidence was introduced and arguments heard, and *Mason v. Blair*, 33 Ill. 194, and *Booth v. Wiley*, 102 Ill. 84, are cited under this point. In the first case it appears the trial court allowed the amendment to be made after the issue was made up and the cause had been submitted on the evidence. This was held to be no error. In the second case a hearing was had, both parties introduced all the evidence they desired to, arguments were heard, the court announced what its decision would be, and directed a decree to be drawn up accordingly. After this, but before the decree was signed or entered, complainant on motion, not supported by affidavit, was granted leave to, and did, file amended bill. Held, clearly no ground of error, and that the court is invested with power by statute to allow amendments to be made to bills, pleas, answers and replications.

In these cases and many others decided by our Supreme Court such amendments are favored, and it is held they ought to be allowed in furtherance of justice, and that granting leave to make such amendments is within the discretion of the chancellor trying the cause. That unless it appears such amendment has worked injustice, or great hardship to the defendant, the exercise of such discretion will not be controlled. By the record it appears at the time leave was granted to file the amended bill, leave was also granted to file an amended answer thereto if defendants so desired; that no reason was given in support of the objection made to filing amended bill, nor was it suggested that defendants were thereby surprised, or that injustice, or great hardship to them would result; and as we find nothing in the record inducing the belief that defendants were injured, or their rights prejudiced by such amendment, it follows the court did not err in allowing it.

The next and only remaining point necessary to notice is, that "as no case was proved authorizing the decree, neither the findings nor the order of court were justifiable."

A careful examination of the record satisfies us that the findings of the court were supported by the evidence, and

Norris v. Pierce.

the court properly held that complainant had shown he was entitled to the relief prayed for, by the facts proven. The decree entered is just and equitable, securing to complainant the amount due him from Koch, and depriving the defendants of no right to which they were justly or equitably entitled under the proof. The decree is affirmed.

Decree affirmed.

GEORGE W. NORRIS, IMPLEADED, ETC.,
V.
PETER PIERCE.

Forcible Entry and Detainer—Judgment for Action of.

1. A person can not maintain an action of forcible entry and detainer, the land being leased by him to another, although in the possession of a third person.

2. A judgment should not be rendered against several defendants in such suit, where the evidence shows that only one of them was in possession of the property in question.

3. A judgment, in such case, should properly describe the property.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Wayne County; the Hon. C. C. BOGGS, Judge, presiding.

Messrs. C. S. CONGER and H. TOMPKINS, for appellant.

Messrs. CREIGHTON & KRAMER, for appellee.

MR. JUSTICE GREEN. It is assumed in the printed argument filed on behalf of the respective parties, that this action of forcible entry and detainer was commenced in a justice's court by Pierce, the appellee, against Daniel Kendrick, Millard Kendrick and Temple Kendrick, and that Norris entered his appearance with the Kendricks before

said justice. The record contains no transcript of proceedings in the justice's court, and it is nowhere shown that any judgment was entered there, or any appeal taken. In what purports to be a copy of Pierce's written complaint appearing in the record, he alleges he owns the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 24, T. 1 S., R. 9 E. of the 3d P. M., and was in possession of said premises on or about July 18, 1891. That Daniel, Millard and Temple Kendrick, did, on or about May 1, 1892, forcibly enter into the possession of the same, and have since last mentioned date detained the possession of the same, after written demand of them for the possession thereof, made by Pierce. A copy of what purports to be a summons to the Kendricks to appear before W. H. Van De Water, J. P., to answer the complaint of Pierce, and return of service on all of said defendants, indorsed, is also incorporated in the record, but the premises described in said copy is W. $\frac{1}{2}$ of said N. E. $\frac{1}{4}$ of Sec. 24. The case appears to have been tried in the Circuit Court, by consent of parties, on the complaint filed, and it was there stipulated that the only land in controversy was the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 24, described in said complaint, instead of the W. $\frac{1}{2}$ of said N. E. $\frac{1}{4}$.

By the transcript of the record in the Circuit Court, it appears a jury was impaneled and sworn, and returned the following verdict: "We, the jury, find the defendants guilty." A motion for a new trial was overruled, and a judgment on the verdict was entered as follows: "It is ordered and adjudged by the court, that the plaintiff, Peter P. Pierce, have and recover from the defendants herein, the possession of the premises in question, and that a writ issue from this court to put him in possession of the same; and further ordered, that the defendants herein pay the costs of this proceeding, and that execution and fee bill issue therefor."

The evidence shows that Daniel Kendrick was the only defendant who was in possession of any part of the forty-acre tract of land in question, and he was in the actual possession of the twelve acres thereof, four of which he had

put in oats and eight in corn. The verdict and judgment against the other defendants was not warranted by the proof; neither of them was shown to have been guilty of either a forcible entry upon, or unlawful detention of any part of said premises, and ought not to have been mulcted in costs. The judgment is also uncertain in not describing the premises which were ordered to be put in the possession of Pierce. It further appears that before the suit was commenced Pierce had leased to James Orr the four acres upon which Daniel Kendrick had raised oats, and Orr had taken possession of the same and sowed wheat thereon. The remaining eight acres put in corn by Daniel Kendrick were also rented by Pierce to James Boyd. Counsel for appellee insist the contract with Boyd was never consummated, but Pierce testifies he rented to Boyd, and the latter testified he rented the corn ground of Pierce. Having leased the entire twelve-acre tract to Orr and Boyd, and the possession of Orr not having been interfered with, the right to the possession of the eight acres alone was involved, and in that piece Pierce had no right of possession when the suit was commenced, even if he was then the legal owner; and after having leased the same, and the lease being unrevoked, he could not maintain the action of forcible entry and detainer to recover the possession thereof. *Spurck v. Forsyth*, 40 Ill. 438; *Kepley v. Luke*, 106 Ill. 395; *Allen v. Webster*, 56 Ill. 393; *Muller v. Newell*, 29 Ill. App. 192. For the reasons stated, it was error to enter the judgment complained of, and the same is reversed and the cause remanded.

Reversed and remanded.

LOUISVILLE, EVANSVILLE & ST. LOUIS CON. R. R. Co.
v.

HARRIET J. ALLEN, ADMINISTRATRIX.

Railroads—Negligence of—Defective Claw-Bar—Injury to Section Hand—Assumption of Risk—Notice to Employer.

1. An employe, who, knowingly, continues the use of a defective tool without complaint, no promise to repair the same having been made, assumes the risk attending such use.

2. If such tool, originally in good condition, becomes unsafe through use, a person injured while using the same, in order to recover, must show that his employer or some person whose duty it was to report to him, was informed of such condition.

3. It would have been sufficient, if notice had been brought to the attention of the section foreman, in the case presented.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Jefferson County; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

Mr. C. H. PATTON, for appellant.

Messrs. W. T. PACE and GEORGE B. LEONARD, for appellee.

MR. JUSTICE SAMPLE. Edward M. Allen, the deceased, had been in the employ of appellant from August, 1890, until his injury in December, 1890, from which injury it is alleged he died in February, 1891.

He worked on a section of appellant's road, under foreman Small. At the time of his injury he was attempting to pull a spike from a tie with a claw-bar, an iron instrument, a tool, about five or six feet in length, weighing about twenty-five pounds, the claw of which, when he threw his weight on the bar, slipped from the head of the spike and struck him, as alleged, on the left side of the head, producing, as claimed, the injury which resulted in death.

The negligence alleged, is that the claw-bar was improperly constructed for that purpose, and was out of repair.

The appellee obtained judgment for the sum of \$3,000, from which this appeal is prosecuted, and the principal ground relied upon for a reversal is that the judgment is not sustained by the evidence.

We have read this record carefully, and our conclusions are that the evidence shows, first, that at the time of the employment of deceased the claw-bar complained of was in

use; second, that the deceased and others continued to use it, without complaint of its being defective in any respect; third, that it was of standard make, and of a kind in common use; fourth, that the nicks in the lips of the claw, near the end, did not materially affect its use or render it unsafe; fifth, that as no complaint was made of the condition of the claw-bar, no promise was made to the deceased that it would be repaired or a new one obtained to induce him to continue its use; sixth, that if the claw-bar was defective or dangerous, the deceased knew it as well as any one. These findings of facts under the evidence in this record require us to reverse this case.

The evidence is undisputed, that the claw-bar was of standard make and as safe as any other kind in use. In this respect, then, the appellant had complied with the law and performed its duty toward the deceased. If the claw-bar thereafter became unsafe, notice of the fact must be brought to the attention of some one, whose duty it was to report the fact to appellant, in order to hold it liable for an injury arising therefrom.

In this case it would have been sufficient, if notice had been brought to the attention of the section foreman. There is no proof that any of the men using this claw-bar made complaint to him or in his presence, that it was unsafe, and there is no proof of the facts from which he should have inferred that it was dangerous. It is evident that neither he nor the men on the section thought it was unsafe, even after the accident; for they used it thereafter just the same as before.

It was almost as simple a tool as a hammer, and required no particular skill to determine its condition, and therefore the men knew, just as well as the section foreman, whether it was dangerous or not. There was no proof of a promise to repair the claw-bar to induce the deceased to continue its use. The evidence of the appellee in rebuttal, as to what the section foreman is claimed to have said when visiting the deceased during his illness, was not original evidence of such fact, and is not affirmative proof, as counsel well under-

stood, or they would have introduced that evidence in chief. If the claw-bar was unsafe, the appellee's decedent knew it, and continued to work with it without complaint, and therefore, under the law, assumed voluntarily whatever hazard there was in its use. *The Penn. Co. v. Lynch*, 90 Ill. 333; *Missouri Furnace Co. v. Abend*, 107 Ill. 44. The judgment is reversed without remandment, on the finding of facts that will be incorporated in the final order.

Judgment reversed.

ANDREW T. HAWLEY

v.

MARION T. KETTLEWELL, ADMINISTRATOR.

Administration.

Upon a claim filed against the estate of a deceased person, it being contended that an amount named was due upon a sale of certain real estate, from claimant to deceased in his lifetime, the fact being that all the notes given in connection with such transaction were returned to their maker, and a release of the trust deed they were given to secure duly executed, this court declines, in view of the evidence, no question of law being involved, to interfere with the judgment for the defendant.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Madison County; the Hon. B. R. BURROUGHS, Judge, presiding.

In 1874, Andrew T. Hawley, the appellant, sold to John Kettlewell, whose estate is the appellee herein, a tract of land in Madison County, Illinois, and took in payment therefor four notes of \$1,000 each, secured by a deed of trust on the land sold. As is shown by the evidence, and from the notes themselves, Kettlewell made payments on the said notes from time to time. In 1886, the trustee in the said trust deed and plaintiff made a release deed to said John

Hawley v. Kettlewell.

Kettlewell, releasing the tract of land embraced in the trust deed from the lien of said incumbrance, and the plaintiff also then delivered the four notes to Kettlewell. What passed between the parties to this transaction at that time is not known.

Kettlewell died in 1890, and Marion T. Kettlewell, his son, was appointed the administrator of his estate by the County Court of Madison County. The plaintiff filed his claim against the said estate, stating there was due to him a balance of \$191.28, after allowing the credit of \$100 paid to him by Kettlewell on November 17, 1889. The trial before a jury in the County Court resulted in a verdict for the estate. The case was appealed to the Circuit Court where the claim was disallowed by the jury, and the plaintiff has brought the case to this court, and asks for a reversal of the judgment of the court below.

The plaintiff contends that when, in 1886, after the said John Kettlewell had been paying on the notes for twelve years, two years after the last one became due, that he, the said plaintiff, agreed to release the land and give Kettlewell his notes, and to allow Kettlewell to pay the small balance due at his own convenience, and that in 1887, a year after the notes were given up, Kettlewell had figured up the exact amount due. In support of this contention the plaintiff proved, on the trial by Jonathan Quarton, who is a justice of the peace, and who knew Kettlewell and had done business for him, that the decedent, Kettlewell, came to him in the latter part of 1887, and stated that he, Kettlewell, wanted to make a settlement with Mr. Hawley; that it was on some notes, and he did not know how much was due to Hawley. Kettlewell was unable to read or write and the witness testified that he agreed to compute the amount due for him. Kettlewell left a memorandum of the original amount and the payments he had made with the witness, and stated that it was a correct memorandum, and thereupon the witness figured up what was due, finding that it was \$296.99, and he so reported to Kettlewell, who said that it was satisfactory to him but did not say he was going to pay the amount. The amount was computed to November 17, 1887.

The plaintiff also proved by A. T. Hawley, Jr., that the decedent, Kettlewell, came to his father's house in November, 1889, and paid some interest, and also \$100; that he knows that Kettlewell owed his father a balance from what his father told him, and knows that the said \$100 was paid on it. In corroboration of the statement of this witness, there was introduced in evidence a certificate of deposit of the Alton National Bank, of date October 1, 1888, which he thinks Kettlewell gave to him as the \$100 payment made at this time. The plaintiff also sought to show by the witness Dexter Ferguson, that he, too, had computed the amount due in November, 1887, but the court ruled out the testimony on the ground that the computation was not made from the notes or from memoranda furnished by the decedent, of which ruling no complaint is made in the argument. The estate rested its defense on the possession of the notes and release deed, which were allowed in evidence, and on the testimony of one S. Midgley, who swore that the plaintiff told him in 1889 that Kettlewell did not now owe him (the plaintiff) one cent. The plaintiff, who was a competent witness for that purpose, denied that he had made any such statement to Midgley.

Mr. H. S. BAKER, JR., for appellant.

While the law presumes payment of a note found in the possession of the maker, yet if facts and circumstances are shown in evidence inconsistent with the hypothesis of payment that presumption is rebutted. *Sutphen v. Cushman*, 35 Ill. 186, see p. 201; *Zimpleman v. Veeder*, 98 Ill. 613.

Mr. JOHN J. BRENHOLT, for appellee.

The fact that a due bill is found in the hands of the maker is *prima facie* evidence of its payment, and the payee suing on the same, is required to overcome the presumption by a preponderance of evidence before he can recover. In a suit to recover an alleged indebtedness, the plaintiff must prove the defendant owes him, by a preponderance of evidence. *Tedens v. Schumers*, 112 Ill. 263:

Hawley v. Kettlewell.

Finding a note in deceased mortgagor's papers, to secure which he had previously given a chattel mortgage, creates the presumption either that the note had never been delivered or that it had been paid and taken up. *Bullock v. Narrott*, 49 Ill. 62.

MR. JUSTICE SAMPLE. The case is quite peculiar in this, that Hawley should not only release the trust deed securing the notes, but also deliver up the notes to Kettlewell and at the same time expect him to pay a balance due thereon at his convenience. There is no evidence in this record that at the time of the surrender of the notes, Kettlewell agreed to pay Hawley any balance. In fact, there is no evidence of an agreement to pay Hawley any money after the surrender of the notes. This question was propounded to Quarton: "Did Mr. Kettlewell ever say anything to you about paying anything to Mr. Hawley?" A. "I don't know whether he did or not."

When it is claimed Kettlewell paid some money and delivered a certificate of deposit for \$100 to Hawley, Jr., in November, 1889, he did not say what it was for, or that he would pay any more money. What Hawley, Jr., said on that subject, were his own conclusions or statements, made on information derived from his father.

While the appellant doubtless honestly believes that he has a legal and just claim against the estate of Kettlewell, yet under the evidence in this record, showing the voluntary surrender of the notes, under no claimed misapprehension or mistake, we do not believe another jury will look with any degree of favor on the presentation of the claim for a balance due on such notes, after his old friend and neighbor had died. Two juries and courts have passed upon the facts in this case; they were brought face to face with the witnesses. It was for the jury to say whom they would believe, and as the question involved was wholly one of fact we are not disposed, especially in view of the peculiarity of this claim, to disturb the verdict or the judgment of the court below thereon. We have examined the in-

struction offered on behalf of the plaintiff and refused by the court, of which refusal complaint is made in the argument.

The instruction refused was in substance given in another instruction. There being no error in the record, the judgment is affirmed.

Judgment affirmed.

47 472
163s 89

JOSEPH M. MILLER AND JOSEPH BOOS

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

Dram Shops—Sales without License.

1. It was error to proceed with the trial of the case presented—a prosecution by information charging defendants with the sale of intoxicating liquors without a license—the defendants not having been arraigned, arraignment not having been waived, and no plea having been entered by them or in their behalf; this error was not cured by the agreement of defendants that “the trial of this cause be submitted to the court without the intervention of a jury.”

2. It is error in such case to impose a fine upon several defendants jointly, such persons, if proven guilty, being liable under the law to the statutory penalty individually.

[Opinion filed June 26, 1893.]

IN ERROR to the County Court of Jasper County; the Hon. S. F. GILMORE, Judge, presiding.

Mr. JAMES W. GIBSON, for plaintiffs in error.

Messrs. HALE JOHNSON and CHARLES A. DAVIDSON, for defendants in error.

MR. JUSTICE GREEN. This was a prosecution by information filed in the County Court of Jasper County, by

Miller v. The People.

the state's attorney, charging the plaintiffs in error with violating the provisions of Sec. 2 of Chap. 43, R. S., by the sale of intoxicating liquor without having a legal license to keep a dram shop. The information contained thirty-six counts and the defendants admitted in open court, as the record shows, that they had made thirty-six sales of intoxicating liquors within the county of Jasper, in the State of Illinois, charged in the information, within eighteen months prior to August 10, 1892, the day upon which said information was filed. The court found defendants guilty as charged in each and every count of the information, and imposed a fine of \$20 upon them jointly for each offense, as charged. The record discloses the fact that the defendants were not arraigned, did not waive arraignment, and no plea was entered by them or in their behalf. It was error then to proceed with the trial of the cause. *Phillips v. People*, 11 Ill. App. 340; *Haskins v. People*, 85 Ill. 87; *Aylesworth v. People*, 65 Ill. 301; *Price v. People*, 9 Ill. App. 36.

Counsel for defendant in error suggest inasmuch as it appears by the record that defendants agreed "the trial of this cause be submitted to the court without the intervention of a jury," this error is cured. We do not so understand it. A jury was dispensed with, but no other right was waived.

It was also error to impose the fine upon the defendants jointly. If each one was guilty of the offenses charged, and the court so found, then each incurred the penalty fixed by the statute. But by the judgment of the court they were made liable jointly for the minimum fine of twenty dollars for each offense, and by the payment of this amount and costs, both would be discharged from further liability, having each paid but ten dollars or but one half of the lowest penalty fixed for each violation of the law.

For these errors the judgment is reversed and cause remanded. So far as we are at present advised, we are not inclined to hold the other errors are well assigned.

Reversed and remanded.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RAILWAY
COMPANY

v.

J. L. WIGGINS.

*Railroads—Liabilities for Physician's Services to Injured Employes
—Evidence—Instructions.*

1. A railroad company is not bound to pay the bill of a physician attending an injured employe at the instance of another employe, unless the latter was authorized to engage the physician, or such act was subsequently ratified by the company.

2. An instruction not based upon the evidence should be refused.

[Opinion filed June 26, 1893.]

APPEAL from the City Court of East St. Louis, Illinois;
the Hon. B. H. CANBY, Judge, presiding.

Messrs. JOHN H. OVERALL and WILLIAM P. LAUNTZ, for
appellant.

Messrs. COCKRELL & MOYERS, for appellee.

MR. JUSTICE SAMPLE. This suit was brought by appellee to recover for services, as a physician and surgeon, alleged to have been performed at appellant's request, for one of its men who was seriously injured. The facts briefly are, that one Horine—whom it is supposed at some time at least was in appellant's employ, though there is no direct proof of it—was seriously injured on the 12th day of February, 1892, in some sort of a railroad accident, occurring as it is supposed—though the record does not definitely state just where—on the tracks of the National Stock Yards Company, near its National Stock Yards.

The appellee being in the employ of the Nelson Morris Dressed Beef Company, as its physician and surgeon, re-

ceived a message from its telephone that a man was injured, requiring his attention. Supposing that the injured man was one in the employ of the Nelson Morris Dressed Beef Company he promptly responded and proceeded to take care of the injured man. He found a man in charge of engines, and of the men about the place where Horine was, who gave orders in regard to having Horine removed to the hospital, at the request of the appellee. Who this man was, or in whose employ he was, is not disclosed by the evidence, but it is inferred from the location that he was in the employ of the National Stock Yards Company, as he was on the grounds and near their stock yards. This is inferred from the further fact that this place was distant some 4,000 feet from the nearest track of appellant, and from one and a half to two miles from its yards. It is also proven by appellant and not disputed that it had no man or men there who were authorized to act for it, the control there being entirely with the National Stock Yards Company.

On the next day after the injury—the 13th day of February—the appellee claims to have sent a letter to appellant, that one of its men was injured and under his care, and that he would continue to attend the case at appellant's expense, unless otherwise notified.

That letter, it is said, was addressed to Mr. Gay, the manager of appellant—sent in one of appellee's envelopes, with his name and address on the back, thereof.

It is not stated whether or not it was sealed or stamped, or addressed to any street or number, or whether the letter was as a fact actually put in a post office box.

Horine died on the 16th day of February, from the injuries received.

On the 25th day of February, the appellee sent in his bill for services to the appellant. Not receiving any reply, in August, he sent his collector—a Mr. Deams—to see Mr. Gay, who, on demand being made for payment, denied all liability, and also declared the bill was extortionate, whereupon this suit was brought and judgment recovered for the sum of \$175.

Gay testified that he did not receive the letter said to have been sent to him on the 13th day of February, and there is nothing in this record to contradict this statement.

There is no evidence to show that appellee was called to attend Horine by any servant or agent of appellant. If there had been such proof, then it would have been necessary, in order to create a liability against the appellant, to show further that either such agent was authorized to so employ the appellee, or that such unauthorized act was thereafter ratified. It has been so repeatedly decided by the Supreme Court of this State.

There is no evidence to show a ratification of the act by any one, whether such person so calling the appellee assumed to be appellant's agent or acting for the National Stock Yards Company. There is no proof of the receipt of the letter claimed to have been sent by appellee on the 13th day of February. Neither is there any sufficient preliminary proof in this record to have authorized proof of the contents of such letter, for the reasons heretofore stated. The instructions were erroneous. There is no evidence, as assumed in the first instruction, that appellee was called by the appellant or any agent of the appellant. If there had been such evidence this of itself would not have been sufficient to have authorized a recovery, without proof of the authority of such agent to so employ appellee or of ratification of the act, if unauthorized.

It is true the courts have held that under such circumstances, but slight acts of recognition on the part of the principal will be sufficient evidence of ratification, yet there must be some evidence and there is none in this case.

The sending in of the bill on the 25th of February, after the services were performed and Horine was dead, which was not responded to by appellant, is no evidence of ratification.

The second instruction is erroneous for the reason it assumes that there was evidence to show that appellee rendered the services at the request of appellant or of its agents, and in declaring the law to be, that if the services were

City of Vandalia v. Seibert.

rendered at the request of an agent of appellant, without regard to the character of such agent's employment or the scope of the agency, that appellant would be liable.

The judgment is reversed and the cause remanded.

Reversed and remanded.

CITY OF VANDALIA

V.

DEBBIE SEIBERT.

Practice—Examination of Jury.

1. The right to a trial by an impartial jury, is fundamental. The law permits an examination to ascertain whether, or not, the jurors are impartial, as between the litigants. If certain facts are ascertained by one examination, they constitute cause of challenge. The field of inquiry is not limited, however, to the ascertainment of these facts alone.

2. Within the general limits of propriety and pertinency, the examining counsel may search for facts that will reasonably justify a peremptory challenge. A right to the discretionary exercise of three peremptory challenges in civil cases, implies a corresponding right of entering upon subject-matters of inquiry, within the rule above prescribed, which might lead to the discovery of facts that might be made the basis for the intelligent exercise of such discretionary right.

3. In the case presented, this court holds as error the refusal to allow defendant's attorney, in the examination of the jury prior to its acceptance, to ask if the attorneys for the plaintiff were at such time in the employ of any juror in any case not disposed of.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Fayette County; the Hon. JESSE J. PHILLIPS, Judge, presiding.

Mr. JOHN A. BINGHAM, for appellant.

Messrs. HENRY & GUINN, for appellee.

MR. JUSTICE SAMPLE. The appellee recovered a judgment

47	477
79	98

for an injury caused, as alleged, by a defective sidewalk, allowed to become so, as claimed, by the negligence of the appellant. The usual errors are assigned. The only one that we think can be maintained, or at least of a sufficiently serious character to require reversal, is the following, more fully expressed in the written motion for new trial: The court erred in refusing to allow defendant's attorney, in the examination of the jury prior to its acceptance, to ask the jurors if the attorneys for the plaintiff, Henry & Guinn, were now in the jurors' employ in any case now in court not disposed of. The record shows that the appellant's attorney desired to ask of each juror, whether Henry & Guinn were in their employ as attorneys, which inquiry the court refused to allow. An affidavit filed in support of the motion for new trial shows the facts to be, that at the time of the trial, Henry & Guinn were the attorneys for Henry Chrisman, one of the jurors who sat upon the trial of this case, which fact was not known until after the trial; the affidavit further states that such relation, it was believed, did influence Chrisman, and that had the court permitted the inquiry in regard to the relation of the jurymen to said attorneys, the fact would have been disclosed and the jurymen challenged, as the defendant when the jury was accepted had two peremptory challenges left, one of which at least, could have been used upon said Chrisman.

The record is sufficient to raise the question whether it is competent and proper to ascertain if the relation of attorney and client subsists between any of the jurymen sitting in the trial of a cause, and the attorneys on either side trying the same. It is sufficient to raise the further question, whether, if such inquiry is improperly refused and such relation is shown to have existed at the time, the error is a reversible one. The right to a trial by an impartial jury is fundamental. The law permits an examination to ascertain whether or not the jurors are impartial, as between the litigants. If certain facts are ascertained by such examination, they constitute cause of challenge. The field of inquiry is not limited, however, to the ascertainment of these facts alone.

Beyond that field the range of inquiry is largely within the discretion of the examining counsel, supervised by the court. He is free to challenge, within the number limited by the law, without giving any reason therefor. Therefore, within the general limits of propriety and pertinency, the examining counsel may search for facts that would reasonably justify a peremptory challenge. A right to the discretionary exercise of three peremptory challenges in civil cases, implies a corresponding right of entering upon subject-matters of inquiry, within the rule above prescribed, which might lead to the discovery of facts that might be made the basis for the intelligent exercise of such discretionary right. As on the part of the city it would have been an intelligent and prudent exercise of the right to have peremptorily challenged a juror from the box who was known to sustain the relation of client to counsel trying the case for the plaintiff, so, it seems to us, it was substantial error to refuse to permit an inquiry, which, as the record shows, would have disclosed that fact, and upon which disclosure the discretionary right to a peremptory challenge would have been exercised. While such relation might not affect the juror even imperceptibly, yet if the verdict is in favor of the client of such attorneys sustaining such relation to such jurymen, it will be difficult for the opposite party, losing the suit, to be relieved of the impression or fear that such relation had something to do with the result. Men know by their own experiences, the close relation that exists between attorney and client in an important law suit pending, and as a rule, do not desire that the possibility of the influences of such relation shall come between them and the impartial adjustment of their rights. As the defeated party must submit to the judgment of the law, he does so more cheerfully, if assured that the jury before which his case was tried, was entirely impartial.

For the reasons stated we are constrained to reverse and remand this case.

Reversed and remanded.

WILLIAM D. GRISWOLD, RECEIVER,
v.
THE CITY OF EAST ST. LOUIS AND GEORGE W.
DAUSCH, TREASURER.

Municipal Corporations—Illegal Indebtedness—Gas Companies.

1. A constitutional provision designed for the protection of tax payers, forbidding the incurring of any indebtedness by a city, directly or indirectly, in any manner, or for any purpose, beyond a certain limit, should not be disregarded or evaded, and a court of equity ought not, by its decree, assign and appropriate any portion of city taxes collected to the payment of the forbidden indebtedness.

2. It will be presumed that a gas company knew of such constitutional provision when they furnished a given municipality light, and that if the limit had been exceeded by creating the indebtedness for such services, the indebtedness would be illegal and uncollectible, and if it chose with such notice and knowledge to furnish lights to the city, it did so at its own risk, and would not be entitled in law or equity to recover any part of such debt.

3. If in such case, warrants—not certificates—payable from a specific appropriation of a tax levied, but not collected, were accepted by such company in exchange for light furnished, or to be furnished, it would amount to an exchange of one thing for another, creating no debt against the city, but in full payment for such service.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. WILLIAM C. KUEFFNER, for appellant.

Mr. F. G. COCKRELL, for appellees.

MR. JUSTICE GREEN. This was a proceeding in chancery, commenced in January, 1881, and finally heard at the September term, 1892, of said Circuit Court. The court found the equities to be with the defendants and decreed that complainant's bill be dismissed. William D. Griswold took

this appeal. By a second supplemental bill, filed July 8, 1889, Griswold sets up and alleges, that by the decree of the Circuit Court of St. Clair County, rendered at the September term, 1886, he acquired the ownership of some certificates mentioned in the original bill and that the same are his individual property. The prayer of the second supplemental bill is, that an account be taken of the amount due complainant, Griswold, on account of said instruments, as well as of the sums in the hands of said treasurer, applicable to the payment of the same, and that said city and Dausch may be ordered to pay to said complainant the amount that may be so found due him, out of any money or funds in their possession applicable or specially appropriated for that purpose. It is claimed on behalf of appellant, Griswold, that he was entitled to recover the sums of money mentioned in said certificate, and the court erred in refusing the relief prayed for in said second supplemental bill. These identical seven certificates were sued upon in an action of assumpsit, brought in the Circuit Court of St. Clair County, by the East St. Louis Gas Light and Coke Company for the use of William P. Griswold, against the city of East St. Louis, which cause was tried in said court.

The jury returned a verdict for the defendant and judgment on the verdict was entered, from which judgment plaintiff appealed to this court. At the August term, 1892, that judgment was affirmed, and this court held said seven certificates evidenced indebtedness created by the city in violation of the constitution, and that a suit to recover the amount thereof could not be maintained. But it is said on behalf of appellant, if the seven certificates are illegal and void, yet they constitute an equitable assignment of the *pro rata* part of the appropriation and tax levy for the year 1876, and the officer receiving the tax is personally liable for the amount to the holder of the certificates. The tax levy mentioned was \$96,832.12, of which amount \$10,666 was appropriated for public lamps. This levy and appropriation were provided for in an ordinance approved August 8, 1876. Of the whole amount of the levy \$69,000 was col-

lected during the following years up to 1880, and on December 9th, in that year, defendant Dausch, as city treasurer, received from the county collector \$7,097.75 city tax paid by Wiggins Ferry Co. for the year 1876. Shortly after this money was received by Dausch, the attorney for Griswold presented these certificates to said city treasurer and demanded payment, which was refused. Dausch then had the money, and has never accounted for it to the city. If the contention on behalf of appellant is to be sustained, we must hold that a city can, in violation of the constitutional inhibition, create an illegal debt, issue certificates evidencing the same, and a court of equity must, by its decree, compel the payment of such illegal debt by the city treasurer, to the holders of said certificates, out of the city taxes received. We can not hold such to be the law, and allow that to be done indirectly, in the guise of an equitable assignment, which could not be done directly.

It is immaterial whether or not the sum collected belongs to the city, or that Dausch retains it and has not accounted for it to the city. It is sufficient to say that no part of it ought to be used for the payment of an illegal debt. A constitutional provision designed for the protection of tax payers, and forbidding the incurring of any indebtedness by a city, directly or indirectly, in any manner, for any purpose, beyond a certain limit, ought not to be disregarded or evaded, and a court of equity ought not by its decree assign and appropriate any portion of city taxes collected, to the payment of the forbidden indebtedness. The East St. Louis Gas Light and Coke Company must be presumed to have known of this constitutional provision when they furnished the light, and that if the limit had been exceeded by creating the indebtedness for such services, the indebtedness would be illegal and uncollectible, and if it chose with such notice and knowledge to furnish lights to the city, it did so at its own risk, and would not be entitled in law or equity to recover any part of such debt. Griswold occupies the same position. A different question would be presented if these certificates were warrants payable

from a specific appropriation of a tax levied, but not yet collected, which were accepted by the gas company in exchange for light furnished or to be furnished. This would be an exchange of one thing for another, creating no debt against the city but in full payment for such service. After a careful examination of the evidence in the record we have reached the conclusion that the decree of the Circuit Court is right and should be affirmed. This conclusion is, as we think, fortified by many decisions of our Supreme Court.

In the opinion in *City of Springfield v. Edwards*, 84 Ill. 626, commenting upon the constitutional provision, Sec. 12 of Art. 9, and determining what kinds of indebtedness are within its terms, the court say, first, the tax appropriated must be actually levied; second, by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the appropriation and issuing and accepting a warrant or order on the treasury for expenses, must operate to prevent any liability to accrue on the contract against the corporation. If the making of the appropriation and issuing and accepting a warrant for its payment does not have the effect of relieving the corporation of all liability, or in other words, if it incurs any liability thereby, it must incur, either absolutely or contingently, a debt. In *Law v. The People*, 57 Ill. 385, the *Edwards* case was considered, and the manner in which revenue already levied and to be collected might be anticipated without the city becoming indebted, or violating the constitutional or statutory prohibition, was pointed out. It was there held the tax upon which the warrant is drawn, must at the time be actually levied, and the delivery of the warrant on the treasury must have the legal effect, and operate as a contract between the corporation and the person receiving the warrant, that the city shall thereby incur no liability whatever. In such a case there is no debt incurred, because the warrant on the treasury is received for the work done, or the articles furnished. We followed these rulings of the Supreme Court in *City of East St. Louis v.*

Flannigan, 26 Ill. App. 459-60, and in same case reported in 36 Ill. App. 51.

In *Prince v. City of Quincy*, 128 Ill. 843, a case where it was shown the water furnished to the city by Prince, by virtue of a city ordinance fixing the price and terms for the water so supplied, and it was also shown that Prince had complied on his part with the terms of the contract, and the city had the means on hand to pay him the unpaid balance due him for such service, his right to recover was denied, and the Supreme Court held the effect of the constitutional inhibition is, to require cities indebted to the limit thereby fixed, to carry on their corporate operations while so indebted, upon the cash system, and not upon credit to any extent, or for any purpose, and that if any indebtedness of a city for current expenses, such as supplying water, is forbidden, as being in excess of the constitutional limit, the contract upon which it arose, though in itself executory, and creating only a contingent liability, is also forbidden. Prohibition of the end, is prohibition of the direct, designed and appropriated means by which the end can be accomplished. The decree of the Circuit Court is affirmed.

Decree affirmed.

OHIO & MISSISSIPPI RAILWAY COMPANY

V.

JOHN D. ALLENDER.

Railroads—Negligence—Personal Injury—Relation of Passenger—Custom—Contributory Negligence.

1. Whether or not a person bringing suit against a railroad company to recover for personal injury alleged to have been caused through its negligence, was injured by reason of an apoplectic attack brought on through his own imprudence, is a question of fact for the jury in a given case.

2. A custom, to avail as such, must be certain, uniform, reasonable, and so general as to afford a presumption that parties contracted with reference to it.

47	484
59	621

47	484
72	363

47	484
100	152

O. & M. Ry. Co. v. Allender.

3. If a passenger is injured through boarding a moving train, a sufficient stop having been made for him to have boarded it in safety, such act constitutes contributory negligence and bars a recovery. Proof that others had frequently boarded trains with knowledge of servants of the company operating the train after the fact, without proof of encouragement so to do, would not prove custom or license.

4. A person voluntarily boarding a train, by mounting the front platform of the express car therein with the knowledge that such car is in the exclusive control of the express company, can not place the railroad company in the position of being legally required to do an act which he knew it had no legal right to do, viz., see that the front door of such car was unlocked, so that plaintiff could pass through such car in order to reach a passenger coach in its rear, and this would not be the law, even if the contractual and legal relation of passenger existed at the time.

5. Such contract is subject to modification and change by the agreement or acts of the parties. It implies that a passenger will present himself in the usual and ordinary way, as known to him and provided by the company, to take passage on its train, and thus obtain the full accommodation and safety to his person that was secured by the contract.

6. A person voluntarily going upon the front platform of the express car in a given train, takes upon himself the hazards of his voluntary act, which imposes upon him the exercise of a degree of care commensurate with the risk voluntarily assumed in the ordinary and usual running of the train, he knowing such car to be in the exclusive control of the express messenger.

7. An engineer ordinarily has no right, by his invitation to a person to board his train, to create the relation of passengership.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Clay County; the Hon. CARROLL C. BOGGS, Judge, presiding.

The appellee lived at Clay City, and on the 23d day of November, 1891, desiring to go from there to Olney, purchased a ticket with the intention of taking the 10:40 A. M. passenger train, but learning, as he claims, from the station agent, that the train was an hour late—(this the agent denies) went back to his house several blocks away to get his dinner. The train was in fact forty-six minutes late. Just after having finished his dinner he heard the train coming, when he ran rapidly to the station, to take the train. This violent exertion tired him considerably. The train had

moved up about two car lengths when appellee reached the railroad track, about which time the engineer inquired if he wanted to board the train, when learning that was desired, the appellee says, "the engineer stopped the train or slowed it up," and said, "get on quick." Appellee said on direct examination, "I went on right up the steps of the platform—meaning the front platform of the express car, next to the tender—and had hardly straightened up when he pulled out as hard as he could go.

Q. Did he look out of the cab toward where you were when you was coming up the road? A. Yes, sir. He was leaning out of the cab.

Q. How far were you away? A. Forty or fifty yards.

Q. What did he do then? A. He stopped the train.

Q. Did you halloo out to him? A. I waved my hand.

Q. Then he stopped the train? A. Yes, sir.

Q. Do you know whether he stopped still? A. I think it was still. It was shaking a little. He had moved the train east. A part of it—the engine—had crossed Main street.

Q. How long after you got on the steps before he turned the steam on? A. I had got off the steps and got on the platform and was holding to the guard rail that goes around the end and facing the engine.

He says he saw the engineer in the cab, but does not recollect whether the engineer saw him or not, though he could have done so, while standing up.

On cross-examination the appellee seems to be inclined to think that the train had started and was moving a little when he got on. The engineer, who testified on behalf of the appellant, says, as he slackened up, appellee got safely on the front platform of the express car. He did not see appellee thereafter. Appellee says he did not call to the engineer thereafter.

Appellee says he stood on the platform until the train had run a short distance, when he tried to open the door of the express car, but could not do so. After the train had

proceeded about two miles he tried it again, and failed. He says the door would only open a little, but he saw the messenger, who was in his shirt sleeves, putting on his cuffs, look at him, but he made no reply to the request to let him pass through the car. Between these efforts to get through the car, he sat down once on the platform. He says: "I only made two efforts to get through. I told him I was freezing. (The messenger denies all this evidence.) I took hold of the rod of the car going round the end of the car. I held on to that until they threw me off or I fell off. When I came to the curve the train was jostling. I held on as tight as I could. My arms were stiff. My hands and body were cold. My hold gave way and I fell from the train. I went off on the south side of the curve. The train was running about thirty or forty miles an hour."

Q. You say your hands grew numb? A. Yes, and my arms grew numb. My whole body was chilled.

Q. What effect did that have? A. That is what loosened me from the rod. Chilling me is what loosened me from the rod I was holding to. I knew I was falling when my hands came loose. When I felt my hands loosening I fell backwards. I had a faint recollection that I was falling.

The evidence shows that a lantern placed on the rear platform of the rear coach where there is the most swing will not be thrown off, although unfastened. No one of the trainmen except the engineer, knew that appellee got on, or was on the train at any time, or place, or that any one got on the platform of the express at Clay City.

The appellee was bruised some on the left side of the head and body, but no bones were broken. He was carried home and after a time he became paralyzed in the left side. That appellee was badly injured, is clearly proven.

Appellant contends that the facts show, that, being a large man, weighing over two hundred pounds, exhausted by his run to the train, then suddenly becoming chilled, he fell from the train by reason of an apoplectic attack, which was brought on by his own imprudence. There was expert evidence to sustain this theory.

That was, however, a question of fact for the jury, hence the evidence on that point is not set out in detail.

The appellee says the car he got on was immediately behind the tender; that he had on a number of occasions passed through the express car to coaches, and seen others do so, and that the conductor had taken tickets of passengers in such cars. But on this occasion says he did not get on the express car because he had done so before, but because he thought it was safest; the car at the time was jolting back and forth a little.

He further says he had observed the management of express cars for many years, and knew that the messengers had exclusive control of them.

The rules of the company, introduced in evidence, show that the engineers must obey the orders of the conductor in the starting, stopping and management of the trains.

The first count of the declaration alleges, in substance, that appellee purchased a first class ticket, according to above statement, and boarded one of the cars of appellant's passenger train (does not aver which car), but on account of the negligence of appellant in the management and operation of the same, the door of the car he tried to enter was shut, and closed against him, and was by the defendant, carelessly and negligently suffered to remain, and kept closed, so that plaintiff could not get the same open, and could not get into said car or any other car of said train, but on the contrary he was compelled to stand, and remain out on the platform of said car until the happening of the grievances hereinafter complained of.

That simultaneously with his getting onto the platform of said car, and before he had time to alight therefrom, after finding the door of the same closed against him, and without giving him an opportunity to do so, or to get into a place of safety, the defendant, well knowing the plaintiff's position to be one of extreme peril, carelessly, negligently and willfully, began to run said train at such a rate of speed that the plaintiff could not, and was not able to get off said car in safety, and so continued to run the same, not-

withstanding his perilous position was well known to the defendant, at such a willful and furious rate of speed that he was unable to stand, and remain on the platform of said car, but because of the great rate of speed of said car and rocking and jerking of same, occasioned thereby, and while he was using every effort to hold on to said car, he was thrown with great violence and force from the same, onto the ground, and thereby greatly and permanently injured.

The second count alleges the facts substantially according to the statement of facts above set forth, averring that he was misled by the agent as to the time the train was late; that the train slackened in its speed after starting, but did not stop so he could get on, and that he got on the front platform of the express car without knowing what car it was, and that the train pulled out without giving him time to try the door; that he twice tried the door and could not get in, and that while using every effort to hold on, owing to the great rate of speed, etc., he was thrown off, etc.

Messrs. POLLARD & WERNER and A. J. LESTER, for appellant.

Messrs. C. K. THARP and CULLOP & KESSINGER, for appellee.

MR. JUSTICE SAMPLE. It will be observed that the first count of the declaration predicates negligence on, first, the door of the car appellee attempted to enter being closed, and kept closed, so that he could not enter it; second, that the train started at a rapid rate of speed before he could discover said fact, and safely alight from said car; third, that knowing appellee's perilous position, a high and furious rate of speed was continued, whereby, although appellee was using every effort to hold on, he was thrown off and injured.

The second count predicates negligence on, first, the misinformation as to the time the train was late; second, that the train did not stop so that he could get on the passenger coach and therefore got on the platform of the first car without knowing what kind of a car it was; third, that the train

pulled out before time was given to try the door and alight; fourth, that owing to the high rate of speed, appellee was thrown off the platform, as against every effort to remain on the train.

It is material to inquire who kept the door closed so that appellee could not enter the car. The averment is that appellant by its servants kept the door closed. It is undisputed that the messenger in charge of the express car was not a servant of appellant, and was in no way in its employ, but was in the exclusive charge of such car for the Adams Express Company. The business of transporting moneys and other valuables for the public, necessitates privacy, and the exclusion of the public from such front car, as much as from the space inside the railing or counter of a bank. The point is undisputed that the traveling public are excluded from such car, although it also shows that appellee and others had occasionally been admitted. There is no proof, however, that appellant ever assumed the right to admit to such car, any passenger, or in any way invited or encouraged passengers to enter such cars. Under the proof the admission was solely on the part of the messenger of such car, and then in evident violation of the rules of the express company, and there was no other recognition of such right on the part of the railroad company, than the collections of fares from such passengers if known to be there. There is no proof that the conductor or collectors of fares made a business of going through such cars to see if passengers were riding there, or that the railroad company in any way held out to the public, any inducement to board such cars as a proper way to reach the passenger coaches. A custom, to avail as such, must be certain, uniform, reasonable and so general as to afford a presumption that the parties contracted with reference to it. The proof in this case falls far short of showing such contractual right on the part of the appellee.

It is a common practice for belated passengers to get on trains while moving. This is a matter of common observation, and is well known to railroad companies.

If a passenger is injured in so doing, the train being stopped sufficient time for him to have boarded it in safety, the courts uniformly hold that such act is contributory negligence and bars a recovery. Proof that others had frequently boarded trains with knowledge of servants of the railroad company operating the train, after the fact, without proof of encouragement so to do, would not prove custom or license.

The proof in this case shows conclusively, and it is not denied, that appellee knew he was attempting to enter the coaches through the express car. He says he got on the front platform of the first car after the tender, thinking it was more safe to do so than to go to the coaches direct. He does not claim that the engineer invited or suggested that he should get on the express car. He testified that he knew such car was in the exclusive charge of the express messenger. His act was therefore voluntary and intentional, though not very deliberate, as he was late. The stopping of the train by the engineer for appellee's accommodation, enabled him to get on the train. Although the engineer did not invite or suggest to appellee that he should board the train at the express car, yet he knew that appellee did so, and pulled out, without knowing whether appellee did or could get through the express car.

It is insisted by the appellee that such acts of the engineer, coupled with the fact that he had purchased a ticket, created the relation of passenger to the railroad company, with all the rights and privileges offered by such relation, and the train on which he took passage. In order to comply with the law of that relation, it is insisted, it became necessary for appellant to open, or see to it that appellee could open, the front door of the express car.

This is insisted upon as the law, without regard to what the custom was as to passengers passing through such a car. To so hold would be to make such duty paramount to the legal right and duty of the express company to keep the door shut. It is not the law that the appellee, by his voluntary act, with the knowledge he had that such express car

was in the exclusive control of the express company, could place appellant in the position of being legally required to do an act which appellee knew it had no legal right to do. This would not be the law, even if the contractual and legal relation of passenger existed at the time. That contract, like any other, is subject to modification and change by the agreement or acts of the parties. It implied originally that appellee would present himself in the usual and ordinary way, as known to him and provided by appellant, to take passage on its train, and thus obtain the full accommodation and safety to his person that was secured by the contract. By boarding the train at the front end of the express car with the knowledge on his part heretofore stated, he voluntarily selected his own accommodations and mode of conveyance, which of itself was not perilous, and thereby took upon himself the hazard of his voluntary act, which imposed upon him the exercise of a degree of care commensurate with the risk voluntarily assumed in the ordinary and usual running of the train.

Had he boarded the locomotive, by the consent of the engineer, instead of the front platform of the express car, under the same circumstances, even if thereby he would have sustained the relation of a passenger to the appellant, yet is there any question but that he would have voluntarily assumed the ordinary hazard of being able to stay on the locomotive if prudently operated, and would have been required by law to exercise a degree of care proportional to such increased risk?

Had he fallen off while the train was being run in the ordinary manner and been injured he could not have been heard to say that he should not have been permitted to board the locomotive, or that if it had not been run so fast, he would not have been injured.

This case is distinguished from that of *L. S. & M. S. R. Co. v. Brown*, 123 Ill. 162, in that the train that carried appellee was operated in the usual and prudent way for the transportation of passengers, while in the *Brown* case the proof was that he was thrown from the foot-board of the

engine by the sudden stopping and starting of the engine in making a running switch, which was dangerous to one who had no notice. Brown had no warning, and therefore did not exercise that extraordinary care the peril imposed.

Had he fallen off the foot-board, while the locomotive was regularly proceeding to its destination, without the sudden jerking required in order to make the running switch, then these cases would be parallel in principle.

The right of recovery in the Brown case, however, is based on the sudden jerking of the locomotive, without warning being given to Brown. In the cases of N. C. R. R. Co. v. Ewing, 3 Am. and Eng. R. R. Cases, 465; Patterson's Railway Accident Law, 204; Pierce on Railroads, 329; Wilton v. M. R. R. Co., 107 Mass. 108; C., B. & Q. R. R. Co. v. Sykes, Admr., 96 Ill. 162; Tutor v. Mansfield Ry. Co., 38 La. Ann. 111, and other cases cited, there was either invitation or conduct on the part of the servants of the railroad companies to induce the party injured to *ignorantly* place himself in a position of peril which resulted in the injury, or the party having done so voluntarily, there was subsequent negligence in the operation of the train on the part of the railroad companies, which was of itself the efficient cause of the injury. This distinction is noted and clearly stated in W. Ry. & T. Co. v. Spacklett, Admx., 19 Ill. App. 145, at p. 148; see also C. & N. W. Ry. Co. v. Reilly, 40 Ill. App. 446.

Had the appellee, while in the position he was permitted to assume, been injured in a wreck caused by the negligence of the company, it may be there would have been, as held in some of the cases cited, a liability on account of the qualified relation he sustained to appellant. But see Abend v. T. H. & I. R. R. Co., 111 Ill. 202. Under the authority of the case of C., B. & Q. R. R. Co. v. Casey, 9 Ill. App. 632, it is held, however, that an engineer ordinarily has no right, by his invitation to a person to board a train, to create the relation of passengership; that such invitation is not in the course of his performance of a duty. This conclusion is reached after a careful and able review of the authorities.

Hence, if it should be held that the act of the engineer

was an invitation to board the express car, under this authority there could be no recovery.

We prefer, however, under the facts of this case, to base our decision upon the qualified relationship of appellee to appellant, growing out of his conduct, under which there was no negligence shown on the part of appellant. The appellee knew the position in which he was placing himself when he mounted the steps of the express car. He knew that it was the first car next to the tender and that it was not a passenger car, and therefore knew that it was not the proper place to enter the train as a passenger, with all the rights and accommodation such relation would afford him. He says he was afraid of getting hurt or being left, if he tried to board a passenger car, the only proper car for him to attempt to enter with the right to claim the full and complete relation of a passenger, and therefore he took the chances of being able to get into the passenger car and thereby place himself in the full relationship of a passenger with the appellant or of accepting the accommodations and the risk of the situation in which he voluntarily placed himself. He was not misled by the engineer or any other servant of the appellant to his injury. How could the appellant be expected to afford him the comfort and security of its passenger cars when he voluntarily placed himself in a position that he could not reach them? The judgment rendered was based upon law not in harmony with the views.

The judgment is reversed and the cause remanded.

Reversed and remanded.

THE EAST ST. LOUIS CONNECTING RAILWAY COMPANY

v.

PATRICK ENRIGHT.

47 494
152s 246

Street Railways—Negligence—Personal Injuries—Master and Servant—Vice-Principal—Change of Venue—City Courts.

1. The fact that a person's condition at the time of bringing a suit against his employer to recover for personal injuries suffered through

E. St. L. Con. Ry. Co. v. Enright.

his negligence, was the result of intoxication, will not release the defendant from the damage caused by his negligence.

2. One city court in this State can obtain jurisdiction of a cause sent by change of venue from another city court.

3. Such court has jurisdiction of such case even though the litigants are not residents of the city wherein it sits, and were not served with process therein.

4. In an action brought by an employe of a railway company to recover for personal injuries received from the fall of a telegraph pole which he was assisting to remove, this court holds, in view of the evidence, that he had a right to believe that he was not in any danger in performing the work as directed; that a case of negligence is clearly made out, and that the judgment for the plaintiff must be allowed to stand.

[Opinion filed June 26, 1893.]

IN ERROR to the City Court of Alton, Illinois; the Hon. JAMES E. DUNNEGAN, Judge, presiding.

Mr. CHARLES W. THOMAS, for plaintiff in error.

Mr. A. R. TAYLOR, for defendant in error.

MR. JUSTICE SAMPLE. This suit was brought by defendant in error to recover damages for an injury alleged to have been caused by the negligence of the plaintiff in error, and judgment was recovered in the court below from which this writ is prosecuted.

The record discloses the following state of facts: On the 14th day of July, 1890, Enright was ordered by Haines, assistant superintendent of plaintiff in error, to dig a trench so as to shift a telegraph pole along such trench to the place desired. Enright dug the trench as ordered. After having removed considerable of the earth about the pole, it fell on him and injured him quite seriously. Enright had had no experience in such work, and had no notice that it was dangerous.

The wires were fastened on the pole and, as Enright states, he supposed they would sustain it.

Haines testified that in so shifting a pole, props should

be set up so as to hold it in an upright position, and that two men should handle the props; that it was necessary for the security of the men to be protected in that way; that he did not have the usual telegraph props with forked ends, but intended to use a spike pole for that purpose, which he neglected to do. He called one Lucky away from digging in the trench, and told him to go and get the spiked poles, intending to come back soon again and direct the work, but his attention was called to another matter, so that he did not return for about two hours, when the injury was done. He admits that he forgot about Enright. Lucky, who, it is said, was sent after the poles, did not return, and there is an utter absence of explanation of his failure to return. Enright was not notified that supporting poles were necessary, or that Lucky was sent after them, and Haines testified: "I told him—Enright, nothing about danger."

Enright had a right to believe that he was not in any danger in performing the work as directed. The evidence clearly makes out a case of negligence.

It is urged that Enright's condition at the time of the suit was brought about by getting drunk, shortly after he was able to move about, and falling down, injuring one of his limbs. If so, that would not release the plaintiff in error from the damage caused by its negligence.

The extent of such injury, so received, was presented to the jury, and doubtless that fact was duly considered in fixing the amount of the verdict. It is also urged that the court erred in giving the first instruction for the plaintiff below. The portion of the instruction objected to, is: "And if the jury further find, from the evidence, that said Haines directed said work to be so done, and did not direct said pole to be so braced and guarded, and did not furnish any appliance for such braces or guards," and then goes on to state that if, in that regard, Haines did not exercise ordinary care, and that Enright was inexperienced and ignorant of the danger, and was exercising ordinary care, then plaintiff was entitled to recover. We see no objection to this instruction. There is no evidence that Lucky, who is said

to have been sent after the pikes to support the telegraph pole, knew anything about using them. He was simply to bring them, so it is said. Haines evidently intended to return and superintend their use and the work, in such a way as to protect Enright from danger. He realized that this was necessary for Enright's safety; but, as he testifies, he forgot all about it for about two hours, and then the damage was done.

The point is also made that the City Court of Alton had no jurisdiction to try the case.

This action was originally brought in the City Court of East St. Louis, from which the plaintiff in error took a change of venue, and the case was sent to the court where tried. The plaintiff in error moved to remand the cause to the City Court of East St. Louis, which motion was overruled and exceptions were taken. The point made is, that a city court in this State can not obtain jurisdiction of a cause sent by change of venue from another city court. An able argument is made in support of this proposition, but it is thought that the case of *Lowry v. Caster*, 91 Ill. 193, is conclusive in favor of the jurisdiction of the court below.

The statute provides—Sec. 287, Chap. 37, page 738, Starr & C., Ill. Stats.—that “Change of venue from city courts, for the same causes and in the same manner, may be taken as from circuit courts, and the cases sent to the Circuit Court of the county, *or to some other convenient court of record*, where the cause of complaint does not exist.”

In the *Lowry* case, *supra*, the Supreme Court held that a city court was a court of record of competent jurisdiction, which it is said is all the statute requires. The only difference between that case and the one in hand is, that the change of venue in the *Lowry* case was from the *Circuit* Court to the City Court, while the change of venue in this case was from a city court to a city court.

The point of counsel's argument, however, is that the jurisdiction of city courts is local, and that their jurisdiction is not only limited as to territory but as to the class of persons who may sue and be sued there; that is, such courts

have no jurisdiction, it is said, of a cause between litigants neither of whom was an inhabitant of the city or served with process therein.

This argument is as applicable to the Lowry case as to this case, for the objection goes to a city court taking jurisdiction of a case wherein the parties—or the defendant, at least—did not inhabit such court's territory, or were not found therein.

The change in the Lowry case took it from Kendall County to the city of Aurora, in Kane County.

The judgment is affirmed.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY

V.

J. M. PIRTLE, ADMINISTRATOR, ETC.

Master and Servant—Railroads—Negligence—Personal Injury to Employee—Improper Machinery and Appliances—Wheels of Tender—Fellow-Servants.

1. It is not the law, that because the engineer had notice of the defective condition of the wheels of the tender to his engine, and he was a fellow-servant of a brakeman on a given train, that therefore the latter had notice. The doctrine of fellow-servants will apply in such case if an injury occurs through the negligence of such engineer.

2. In an action brought to recover for the death of a railroad brakeman, the same being alleged to have occurred through the use of a tender with defective wheels, this court holds, in view of the evidence, that the judgment for the plaintiff can not be disturbed.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Washington County;
the Hon. GEORGE W. WALL, Judge, presiding.

MESSRS. CHARLES T. MOORE and GREEN & GILBERT, for
appellant.

Messrs. FORMAN & MERRICK and WATTS & WATTS, for appellee.

MR. JUSTICE SAMPLE. On the 21st day of October, 1890, Henry T. Perry, while in the employ of appellant as front brakeman on a freight train, and while in the performance of his duty, was killed in a wreck of the train, caused by the cars leaving the rails. The deceased left a widow, on whose behalf, under the statute, this action was brought and verdict and judgment obtained in the court below.

This court is asked to reverse that judgment because, as claimed, the evidence does not sustain it.

The negligence averred is, that the flanges of the wheels of the tender were so worn, cut, imperfect and in such unsafe condition, that the wheels of said tender car ran off the track and wrecked the train, whereby Perry, while in the exercise of due care for his own safety, was killed, of which imperfect and unsafe condition of said wheels the appellant, before such accident, had notice, and the deceased did not.

There is uncontradicted proof, that twice during the month of October, before the accident, the engineer in charge had reported to the proper authorities, calling attention to the wheels of this tender, and nothing was done toward remedying the defects.

The engineer testified that the flanges of the wheels on the left hand side of the tender were wearing sharp, while those on the right hand side were in good condition. The general foreman of the shops admits that his attention was twice called during the month of October, prior to the accident, to the fact that the flanges of the tender wheels were worn. The assistant foreman admits that his attention was twice called to the tender wheels, but denies that his attention was called to the flanges of the wheels. It is also admitted that nothing was done to remedy the defect.

It is clear, under the evidence, that the flanges of the tender wheels on the left hand side of the tender were defective, or worn so that they needed repairing, or the tender needed new wheels. It is also clear that the company had notice

of such condition before the accident happened in time to have made them safe, and did not do so.

It is also clear that the deceased did not have in his charge the care of the wheels of the tender, and there is no proof that he had notice of their defective condition.

It is not the law, that because the engineer had notice, and he was a fellow-servant with the brakeman, that therefore the brakeman had notice.

The engineer was not negligent in the performance of his duty, whereby the accident happened, for he had reported these wheels to the company as being defective. He did not have to notify Perry, the deceased. Had the engineer, in the operation of the train, or of said car, been negligent, whereby the accident and injury occurred, then the doctrine of fellow-servants would have applied. No such claim is made. The evidence shows that the train was only running, at the time of the accident, at about the rate of six or seven miles an hour.

The serious question is as to whether the defective flanges of the wheels of the tender caused the cars to run off the track, which resulted in the death of Perry.

The crew in charge of the train were Charles W. Styles, engineer; A. L. Joliff, caboose brakeman; the deceased, as front brakeman; Aaron George, conductor, and Walter S. McCosh, fireman.

The fireman jumped, at the time of the accident, from the engine, and was injured. He did not testify in this case. The caboose brakeman testified that he made no examination and did not see the tender or cars off the track, and therefore knew nothing of the cause of the wreck.

The accident happened at about 2 o'clock in the morning, just after the train had left the station of Carbondale, and just before it crossed the track of what is known as the Short Line Road, at which time the deceased was on the car next to the tender. The train was going north, and the engine was stopped by the accident about eight car lengths north of Grand Tower switch, and about three car lengths north of the West Exchange switch, which switches projected from

the main track of appellant's line, on which the train was being run in a northwesterly direction. The split switch, or Grand Tower switch, was on the west rail, and this switch was where some trucks or wheels had just left the track. If the sharpened flanges of the tender wheels did get into this split switch, then the evidence shows that necessarily the wheels would follow it and force them off the main line of track, and that when sharpened, they are apt to do so. To avoid this danger, the flanges are made bevel-edged next to the tread of the wheel.

The engineer testified that the wheels of some cars climbed the rail at the point of the Grand Tower switch and ran about three or four feet on it before dropping to the ground on the *west* side of the rail, and from there ran on the ties to near where the tender stopped. Before reaching the tender, as it stood after the accident, the marks became so mixed that they could not be definitely traced. The *left* or west wheels of the front truck of the tender were off the track on the *west* side of the rail of the main track when it stopped.

The conductor, who also made a careful examination, testified to the same appearance, substantially, as the engineer. The engineer testified that he examined the split switch where the wheels mounted the rails, and that the wheels did not go through the split switch, in his opinion, for the reason that he could see no marks there to indicate it. What caused the wheels to leave the track is to be determined from all the facts and circumstances, and in the same way is to be determined which wheels left the track first and caused the wreck, resulting in the death of appellee's intestate.

We do not believe that the wreck was caused by the spreading of the rails. The track was spread back where the cars were dropped on the ties inside the rails, in our opinion, by the reactionary force caused from the sudden stoppage of the cars in front. The evidence shows that the rear end of the head car and the front end of the second car came together with such force that these ends shot out to the east.

There was no evidence of the spreading of the track back where the wheels *first* got off the track, back at the Grand Tower switch. The first appearance of the spreading of the main track, was, according to the evidence of the conductor, ten feet north of that point, and according to the evidence of the engineer, who we consider made a more careful examination, it was still further away.

That the primary cause of the wreck was the mounting of the west rail of the main track by the wheels of some car back at Grand Tower split switch, we think, is entirely clear. The spreading of the track did not cause the wheels to so mount the west rail and drop on the ties on the west side of it. Had the track been spread there, the wheels of the cars would have dropped inside the rails. They could not have climbed the west rail.

This leaves the cause of the accident to be attributed solely to the wheels of some car getting on the west side of the main rail back at the switch. The cause is to be found, in our judgment, either in a defective switch or defective wheels.

There is no proof of a defective switch. There is proof of defective wheels. Those wheels were the west or left wheels of the tender, which the engineer had twice reported before the accident. The left or west wheels of the tender when it stopped, were found on the *west* side of the main rail of the track and no other wheels were found on that side.

We think, from all the facts and circumstances, that the inference is so strong that the defective wheels of the tender first got off the track and caused this wreck, that such fact may be considered as fairly established by the preponderance of the evidence.

The only question then left is, did the imperfect and defective condition of the wheels of the tender cause them to leave the track at the switch. The evidence is clear that a sharpened flange is apt to leave the main rail at a split switch. These wheels did leave the track at such place.

What, then, is the fair inference, notwithstanding the en-

L., E. & St. L. Con. R. R. Co. v. Spencer.

gineer's statement that the flange did not run through the split switch?

There was some cause for the wheels of the tender to mount the west rail at that particular point. The jury, and the court below, we think, were justified in believing that cause was the defective flange of the wheels of the tender, of which defect the appellant had notice before the accident. The point made by appellee, that the bill of exceptions was defective in not showing that it contained all the evidence, was avoided by amendment.

The judgment is affirmed.

Judgment affirmed.

LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED
RAILROAD COMPANY
v.
N. W. SPENCER.

47	503
149s	97
47	503
58	161

Railroads—Negligence—Injury to Farm Lands—Fire.—Evidence—Instructions.

1. In an action brought to recover from a railroad company, for injury to fruit trees, bushes and vines by fire communicated by sparks from a locomotive engine, it is proper to prove on trial the damage to the real estate by such fire, by showing the difference in value before and after the same.

2. To satisfy the requirements of the law with respect to spark-arresters this court holds that they must not only be of the most approved kind, but must be kept in suitable and good repair to effect the purpose for which they are designed and used.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Marion County; the Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. IGLEHART & TAYLOR, and W. & E. L. STOKES, for appellant.

MESSRS. FRANK F. NOLEMAN, and SAMUEL L. DWIGHT, for appellee.

MR. JUSTICE GREEN. This was an action on the case brought by appellee to recover from appellant damages to his premises, occasioned by the destruction of fruit trees, berry bushes, vines, hedges, etc., standing and growing thereon, by fire, communicated by sparks from defendant's locomotive engine.

The jury found defendant guilty of the negligence charged, and assessed plaintiff's damages at \$1,800. Defendant's motion for a new trial was overruled, judgment was entered on the verdict and defendant took this appeal.

The errors relied on to require the reversal of the judgment, are, the admission of improper evidence on behalf of plaintiff; that the damages are excessive and were assessed for injury to the freehold; that two instructions given for plaintiff were improper and erroneous, and that the evidence did not warrant the verdict. The testimony claimed to have been improperly admitted is Townsend's, who testified without objection to the number of fruit trees, the number of acres of berry bushes and vines destroyed and injured by the fire, and also testified to the value before the fire of the five and three-fourth acre piece of land upon which these trees, etc., were standing, and its value after their destruction and injury; Perrine's, who testified substantially the same facts, and Sherwin's evidence on cross-examination by appellant's counsel, which was not objected to. This evidence is said to have been admitted in violation of the well established and undisputed rule that the *allegata* and *probata* must correspond, and this contention is based upon the theory that the declaration does not aver and claim damages to the real estate of appellee, "but the damage averred is to the trees, hay, mulching, etc." An inspection of the record satisfies us, that by the averments in each count of the declaration, the injury set up and complained of is to the land, the premises, the farm of plaintiff, and the damages claimed are for such injury.

It is also in each count averred that certain fruit trees,

berry bushes, etc., were standing and growing on said premises, and that they were destroyed by the fire, and the value thereof is stated. These averments do not set up a cause of action for the value of the things so destroyed, separate and severed from the freehold, but are employed to describe in part, the character and amount of the injury to the realty; just as in a case where a part of the injury claimed is the destruction of a house on the premises, and its value is averred. These fruit trees, bushes and vines standing and growing upon said premises at the time of the fire, were a part of the realty, and their destruction was an injury to the freehold, diminishing its value and occasioning loss to appellee. Necessarily plaintiff's premises were of greater value before such destruction than after. Hence it is proper for plaintiff to prove what the amount of the difference in value was as a proper guide for the jury in estimating his damages. Such proof was pertinent to the issue and was properly admitted. The two instructions complained of, given for plaintiff, are not obnoxious to the objection that they were calculated to mislead the jury, nor did the court err in giving them, and the damages assessed are not excessive, if the negligence of the appellant is proven as charged, and occasioned the injury complained of. It was not only proven by the evidence, but is admitted in appellant's printed argument, that the fire was caused by sparks from defendant's engine, and destroyed some, and injured others, of the trees, vines, etc., standing and growing on plaintiff's premises.

The amount of the damage so occasioned was also proved to be quite as large as the sum recovered. It is further conceded that a *prima facie* case of negligence as charged was made out, as provided in Sec. 104, page 1949, 2 Starr & C. Ill. Stats. But it is said this *prima facie* case is rebutted by the proof that the most approved spark-arrester was used upon defendant's engine and was examined by a skilled boiler-maker on the day before and the day after the accident, and found to be safe and in good condition, and that the engineer in charge of the engine was experienced, compe-

tent, and performed his duty properly. If it be conceded these facts standing by themselves, rebutted the *prima facie* case, yet their effect was overcome by other facts proven. It appears from the evidence that the fire in question was started at a distance of seventy feet from the engine, by sparks and cinders of size and vitality sufficient, after they had been carried that distance, to set grass on fire; that sparks or cinders from the same smoke stack a few minutes afterward set fire at another place adjoining defendant's right of way at a distance from the engine of between seventy and one hundred feet. These facts tend to negative the claim that the spark-arrester was in good and safe repair and condition at the time of the accident, and doubtless had weight with the jury.

The examination of this spark-arrester was made on the day before and on the day after, but not during the day on which these two fires occurred, and the jury probably found the examination was not very thorough, if on the day after such examination the appliance was in the condition it must have been to permit the escape of sparks and cinders in size and quantity sufficient to start the fire in question, and such defective condition not be discovered. To satisfy the requirements of the law with respect to these appliances, they must not only be of the most approved kind, but must also be kept in suitable and good repair to effect the purpose for which they are designed and used. In the opinion in *T. W. & W. Ry. Co. v. Larmon*, 67 Ill. 68, it is said the law holds railroad corporations to the exercise of a very high degree of care and skill in the use of the most effective appliances to prevent the emission of sparks from engines.

The same rule is announced in *C. & A. R. R. Co. v. Quaintance*, 58 Ill. 389, and it is said also the evidence that the spark-arrester used, was the best and most approved in use, was not sufficient to show the performance of the duty required of the corporation, but it must also appear such appliance was in good repair on the day of the accident, and if sparks were thrown 150 feet, of sufficient size and life to

Eggmann v. St. L., A. & T. H. R. R. Co.

ignite the house in question, it must necessarily have been out of repair. See also St. L., V. & T. H. R. R. Co. v. Funk, 85 Ill. 460, and C. & E. Ill. R. R. Co. v. Goyette, 133 Ill. 21.

We are of opinion the verdict was warranted by the evidence, and the damages assessed were not excessive.

The judgment is affirmed.

Judgment affirmed.

47	507
111	422

EMIL J. EGGMANN, ADMINISTRATOR,
V.
THE ST. LOUIS, ALTON & TERRE HAUTE RAILROAD
COMPANY.

Railroads—Negligence—Personal Injury—Trespasser—Sec. 90, Chap. 114, R. S.

1. A railroad company ordinarily owes no duty to a trespasser upon its track. If injured there can be no recovery, unless the injury was wilfully or wantonly inflicted, or the negligence was so reckless or negligent in its character as in law to amount to wantonness.

2. The fact that the portion of a track where a person was injured was habitually used by pedestrians, does not change the relative rights or obligations of one injured while on the track, or those of the company; such person will still be a trespasser.

3. A failure to comply with Sec. 90, Chap. 114, R. S., touching the rear brakeman of a train remaining in his place, is negligence, for which a liability would arise for an injury resulting therefrom to a person in the exercise of ordinary care, but is no evidence of a reckless disregard of human life. It would not amount to wantonness.

4. A railroad company does not owe any statutory duty as to signals to a person on its track within eighty rods of a highway crossing.

[Opinion filed June 26, 1893.]

IN ERROR to the Circuit Court of St. Clair County; the
Hon. B. R. BURROUGHS, Judge, presiding.

Mr. WILLIAM WINKELMANN, for plaintiff in error.

Messrs. TURNER & HOLDER, for defendant in error.

MR. JUSTICE SAMPLE. This suit was brought by plaintiff in error to recover damages for the death of his intestate, caused, as alleged, by the negligence of the defendant in error.

At the close of the evidence for the plaintiff the court, on motion of the defendant, instructed the jury to find for the defendant, which instruction raises the questions presented on this record.

The facts are, that the defendant owned and operated a railroad from Belleville to St. Louis, Mo., extending in a southeasterly direction from the city limits of Belleville in a straight course for about 900 yards, with no obstructions; that for a number of years, the track for about a mile had been traveled by pedestrians; that near where the accident occurred there was a public highway crossing; that on the east side of the railroad track, and about 100 yards therefrom, there was the Freeburg toll road which ran parallel thereto, of which the deceased had been tollgate keeper for about twenty-five years; that he was an old man and partly deaf, and resided nearly opposite the place where he was killed; that on the night of January 31, 1889, an employe of the defendant was killed on the track nearly opposite deceased's home; that about nine o'clock of the morning of the 1st day of February, the deceased was informed of that fact and started across the field from his house to the railroad track, which was outside the corporate limits of Belleville, to see, as claimed, if any one was there and what he could do; that after reaching the track, he walked up and down, with his head bowed, poking his cane at some objects occasionally, the wind at the time blowing toward the north; the deceased's daughter was standing in the door of their home, about 600 yards away, looking at him. While the deceased was so on the track, a freight train came out from Belleville running in a southeasterly direction at the rate of from twelve to fifteen miles an hour, at the place of the accident, without, as alleged and proven, sounding an alarm until within 100 yards of the deceased, who,

failing to hear it or observe the approach of the train, was struck and so severely injured that he died the same day, leaving a wife and several children depending on him for support.

The evidence does not disclose what length of time the deceased had been on the track before the accident, but it is clear from the evidence that he had been there a sufficient length of time before the accident to have discovered that there was no dead body on the track, before the train struck him. It only required a glance up and down the track to assure him of that fact.

If it is assumed then, as a fact, that the deceased's purpose in going on the track was to remove the body therefrom of a railroad man, who had been killed the night before, yet when he discovered that there was no body there to be removed, as necessarily he must have done at a glance, almost, can it be insisted, under the law, that thereafter, as he remained on the track, walking about, poking his cane at objects, as observed by the plaintiff's witnesses, he was not a trespasser? We think not.

Then, being a trespasser, the law of liability in such case is fixed by a uniform line of decisions in this as well as other States. The defendant owed him no statutory duty because he was on the track, within eighty rods of a highway crossing. *Williams v. C. & A. R. R. Co.*, 32 Ill. App. 339. The question simply is, was there such gross negligence or wantonness as to create a liability, in view of the deceased's relation to the road at the time of the accident. That the deceased was not in the exercise of ordinary care, is self-evident. This is true, whatever was his purpose in going on or remaining on the track.

A person can not deliberately go on a railroad track, over which he knows trains are being frequently run, and remain there, in utter disregard of his situation, without looking or listening for the approach of a train, until he is knocked off the track, and then predicate care upon such conduct. *Austin, Adm., v. C., R. I. & P. R. R. Co.*, 91 Ill. 35; *I. C. R. R. Co. v. Hall*, 72 Ill. 222; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510.

In order to recover under the facts in this case, the injury must have been wilfully or wantonly inflicted, or the negligence must have been so reckless in its character as, in law, to amount to wantonness. *Blanchard v. L. S. & M. S. R. R. Co.*, 126 Ill. 416.

There is no evidence in this record to show wilfulness or wantonness on the part of the men operating the train. The train at the time was outside the corporate limits. The deceased was at a place on the track other than a highway crossing, where the men operating the train had no right to expect a man would be on the track, utterly regardless of his own safety. It is true the evidence shows that that portion of the track had been used by pedestrians, yet, as held in the case of *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510, such fact does not change the relative rights or obligations of one injured while on the track, or those of the company. Such person will still be a trespasser.

From the fact of such use, it certainly will not be presumed that the company had been in the habit of stopping its trains when people were seen walking on the track ahead of the train.

The common observation of every one is that when a railroad track is used by pedestrians to travel upon in the country, that is, outside of corporate limits, that trains do not stop or check up when persons are seen on the track. Such persons know it is their duty to get out of the way, although sometimes they are provokingly slow in doing so.

Had the men operating the train seen the deceased in time, and from his conduct had had reasonable grounds to believe that he would not get off the track, and notwithstanding such facts had run over him, then there would have been a liability, because such conduct would have been wanton, in which case there is no such thing as comparative negligence. It is urged that there is a liability because the rear brakeman was not in his place as required by the statute—Sec. 90, Chap. 114, R. S.—at the time of the accident.

A failure to comply with this statute might be and is negligence for which a liability would arise for an injury result-

Stivers v. The People.

ing therefrom, as to a person in the exercise of ordinary care on his part. But it is no evidence of a reckless disregard of human life. Such negligence would not amount to wantonness.

Badgley had no right to expect the performance of such duty, being himself a trespasser. Under the evidence in this case, the court could not have done otherwise than to take the case from the jury, and the judgment is affirmed.

Judgment affirmed.

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63	218

LYMAN STIVERS

V.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL.

Bastardy—Appeal and Error.

1. An appeal lies directly, in bastardy cases, to the Appellate Court, from the judgment of a County Court. The Circuit Court has no jurisdiction of an appeal in such case.

1. Appeals not being allowable under the common law, the terms of the statute must be complied with when it is sought to take such step.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Lawrence County.

Mr. JAMES S. PRITCHETT, for appellant.

Messrs. GEE & BARNES, for appellees.

MR. JUSTICE GREEN. This was a proceeding under the Bastardy Act, in which appellant was charged by Mary Belles with being the father of her illegitimate child. In the County Court the jury found against him, and the court entered judgment on the verdict. Defendant took an appeal to the Circuit Court, which was dismissed on the

ground the appeal should have been taken directly to this court.

Appellant assigns for error this ruling and decision, insisting, the right of appeal from the County Court to the Circuit Court in cases of this character, has been fixed by numerous decisions of our Supreme Court. *Lewis v. The People*, 82 Ill. 104; *Hauskins v. The People*, Ibid. 193; *Stanley v. The People*, 84 Ill. 212, and *Scharf v. The People*, 134 Ill. 240, are cited and relied on as authority supporting this contention. The decision in each of these cases, so far as the same affects this contention, will be found to have been overruled in *Lee v. The People*, 8 N. E. Rep. 690. In the opinion reference is made to the cases of *Lewis v. The People*, *Hawkins v. The People*, and *Stanley v. The People*, and it is there said:

“The ruling seems to have been recognized by this court in *Scharf v. People*, 134 Ill. 246, wherein it is said the defendant was permitted the verdict of two juries. But that remark was entirely *obiter*, as there was nothing before the court calling for it. Since the decision in the *Lewis* case and other cases decided upon the ruling in that, the General Assembly has created the Appellate Court, and by an amendment to Section 8 of that act (Rev. Stat. 1891, Sec. 25, Chap. 37,) it is now provided that the Appellate Court ‘shall have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the * * * County Courts * * * in any suit, or proceeding at law, or in chancery, other than criminal cases not misdemeanors.’ This operates as an amendment of Section 188 of the Practice Act, and should be read and construed as a part thereof. When it is so read it is plain the effect is to give the appeal in the bastardy case direct to the Appellate Court; for although a bastardy proceeding is not a suit at common law, it is clearly ‘a proceeding at law.’ The manifest purpose is to make the appeal in all cases enumerated, from the final order, judgment or decree of the County Court to the Appellate Court.”

The foregoing is the latest ruling of the Supreme Court

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upon the material question presented here, and is decisive of this case. The Circuit Court had no jurisdiction and this court acquired no jurisdiction of the case, by the appeal from that court.

Appeals were not granted at common law, and it is only by the statute such remedy is furnished to a litigant defeated in the trial court. And to avail himself of it he must comply with the provisions of the statute prescribing the mode of taking an appeal, and take it to the court designated. To give this court jurisdiction in this case, the appeal should have been taken from the County Court directly to this court. This was not done, and the statutory requirement was not complied with, hence we must dismiss the appeal.

Appeal dismissed.

JAMES T. McCASLAND

V.

JOHN DOORLEY.

Statute of Frauds—Debt of Another.

In an action to recover for labor and material in connection with the erection of certain houses, the fact being that the contractor built them upon land of a third person to whom he subsequently turned them over, the latter agreeing to pay the indebtedness outstanding against them, this court holds that such agreement was in the nature of an original undertaking, was not required to be in writing, and was not therefore void under the provisions of the statute of frauds.

[Opinion filed June 26, 1893.]

APPEAL from the City Court of East St. Louis, Illinois;
the Hon. B. H. CANBY, Judge, presiding.

Mr. JOHN W. BARTHOLOMEW, for appellant.

Messrs. E. R. DAVIS and A. FLANNIGAN, for appellee.

MR. JUSTICE GREEN. This was a suit in assumpsit commenced by appellee against appellant to recover for plastering certain houses. It was tried in the City Court of East St. Louis on appeal from justice's court, and plaintiff recovered a judgment for \$125 and costs. From this judgment defendant appealed and brings the record to this court for review. It is undisputed that McCasland, the appellant, owned the lots in East St. Louis, upon which, with his knowledge and consent, one Brockett erected three houses, and contracted with various parties for labor, lumber and other materials used in constructing the same. Among others, he contracted with appellee for the plastering of the houses for a stipulated price. The evidence shows appellee did the work; that a balance of \$125 was due him therefor, and was unpaid when he commenced this suit; that before this suit was commenced, and after said houses were constructed, appellant entered into possession thereof, took and received to his own use, rent therefor, claiming to own the same; that he does own said houses and lots, and has accepted and received the benefit and advantage of the increased value given to his property by the erection of these houses; that afterward parties furnishing material and labor under their contracts with Brockett were about to enforce their liens for the amounts due them, and in fact the firm which furnished lumber had commenced proceedings to that end, when, in order to stop such suits and relieve the property from such liens, appellant paid said lumber bill in full, and paid other of said parties, and if Mr. Bartholomew was his agent, a fact the jury were warranted by the evidence in finding, and if the jury believed appellee's testimony, appellant also, by such agent, paid appellee part of the debt due him and promised to pay him the balance; furthermore, an examination of the record satisfies us the jury were warranted by direct testimony, by the acts and declarations of appellant and his agent, and other facts and circumstances proven, in finding that appellant, in consideration of Brockett's release of all right and interest in the property, and delivering the possession of said houses to appellant, agreed with and promised Brockett to pay all the indebtedness owed

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by the latter for material and labor bestowed in the construction thereof, and entered into possession.

It is urged on behalf of appellant that no such promise and agreement was established by the proof, and if any promise to pay appellee's debt was made by appellant, it was not in writing, and being made after the work was all done, was void, under the statute of frauds. We have already given our view of the facts established by the proof, and hold the jury were justified in finding that the appellant, for a good and valuable consideration, moving from Brockett, promised the latter to pay his creditors all the debts he owed them for labor and material furnished in the construction of the houses. This promise, as we understand the law, was not void, although made after the work was done and not in writing. It appears Brockett, who was a builder, met appellant and wanted to buy lots of him, to erect some houses upon, and appellant told him he had property for sale, and showed it to Brockett, who selected the lots on which the three houses were built, and told appellant he wanted to buy them. Appellant agreed to sell him the lots at a price stated, and says he partly agreed to take a second mortgage to secure the payment. Thereupon Brockett, with the knowledge and consent of appellant, entered into possession of the lots and erected the buildings.

The relinquishment by Brockett to appellant, of this possession, and of all his rights as purchaser, in and to the property, constituted, as we hold, a good consideration for the promise to Brockett by appellant, to pay his indebtedness, which included the debt due appellee.

It was a promise in the nature of an original undertaking, to pay a debt to a third party, and was not required to be in writing, and was not void under the provisions of the statute of frauds. *Eddy v. Roberts*, 17 Ill. 508; *Corbin v. McChesney*, 26 Ill. 232; *Runde v. Runde*, 59 Ill. 98; *Wilson v. Bevans*, 58 Ill. 232; *Scott v. White*, 71 Ill. 287; *Meyer v. Hartman*, 72 Ill. 442; *Walden v. Karr*, 88 Ill. 49-51.

In any view we can take of this case, the recovery was right, and the judgment is therefore affirmed.

Judgment affirmed.

JOSEPH S. BAKER, ADMINISTRATOR,
v.
DANIEL J. UPDIKE, ADMINISTRATOR.

Mortgages—Foreclosure—Mistake—Jurisdiction of Appellate Court.

1. A bill to remove a cloud on the title alleged to have been made by a judicial or tax sale, involves a freehold.

2. A freehold is involved where realty is claimed by a deed, regular on its face, but which is sought to be set aside as a cloud.

3. A bill seeking to correct a description in a mortgage and foreclosing it, likewise involves a freehold.

4. So, also, when the result of the litigation will transfer the same from one person to another, or deprive one person of a freehold by direct attack on his title.

5. It is not sufficient to involve a freehold that the title may be affected, as in foreclosure proceedings, or where the title of a person is decreed to be subject to an execution.

[Opinion filed June 26, 1893.]

IN ERROR to the Circuit Court of Lawrence County; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

MESSRS. CALLAHAN, JONES & LOWE, for plaintiff in error.

MESSRS. JAMES S. PRITCHETT and FRANK C. MESERVE, for defendants in error.

MR. JUSTICE SAMPLE. The plaintiff in error filed his bill to foreclose a mortgage, alleged to have been executed and delivered by James R. Updike to M. W. Updike, on the 6th day of March, 1889, on the S. $\frac{1}{2}$ Sec. 1, T. 4, R. 13, west fifty-five acres, and on the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ Sec. 6, T. 4 N., R. 12 west, forty acres, to secure the payment of \$1,057.50 in one year from date, with interest thereon at the rate of eight per cent per annum.

The mortgage is alleged to have been given to secure the

Baker v. Updike.

purchase money for said land, a deed of which was executed, acknowledged and delivered by M. W. Updike to James R. Updike, on the date above mentioned. The bill alleges that M. W. Updike only intended to convey a three-fourths interest in said land, and that the mortgage and deed purporting to convey the whole tracts was a mistake, which description in the deed is asked to be corrected so as to make it convey only a three-fourths interest in said land to James R. Updike. The answer of defendants in error—the heirs of James R. Updike—denies the execution or delivery of the alleged mortgage, avers the execution of some kind of a writing by James R. to M. W. Updike, with regard to said lands, which never was regarded as a mortgage or a lien thereon, and never was so intended to be, which was afterward delivered up during the lifetime of the parties in consideration of services that had been rendered by James R. for his uncle, M. W. Updike; it further denies that there was any mistake or inadvertence in drawing said deed.

On a hearing below, the court dismissed the bill, from which decree this writ of error is prosecuted; the principal errors assigned and discussed being that the court admitted improper evidence, and decreed contrary to the evidence. The defendants in error raise the question that this court has no jurisdiction, for the reason, as claimed, that a freehold is involved. If this position is well taken, then we can not consider the merits of the case.

A freehold is said to be involved when the result of the litigation will transfer the same from one person to another, or deprive one person of a freehold by direct attack on his title. This question is carefully considered in *Sanford v. Kane*, 127 Ill. 591–597.

It is true it is not sufficient to involve a freehold, that the title *may* be affected, as in foreclosure proceedings (*Pinneo v. Knox*, 100 Ill. 471), or where the title of a person is decreed to be subject to an execution (105 Ill. 217).

The bill alleges that M. W. Updike was seized in fee simple of the undivided three-fourths of the tracts of land above described, and sold “all his interest therein” to

James R. Updike for the amount above mentioned, but by mistake, the whole tracts were included in the deed when he intended to convey only the three-fourths. These allegations in the bill are denied by the answer, which, in effect, though not so expressly averred, is an assertion of ownership to the entire tracts on the part of the defendants in error.

No other person than the defendants in error are averred, or shown to have the title to the one-fourth of said tracts of land, which, it is alleged in the bill, was not intended to be conveyed.

A bill to remove a cloud on the title alleged to have been made by a judicial or tax sale, involves a freehold. *Bridges v. Rice*, 99 Ill. 414; *Brown v. McCord*, 9 Ill. App. 550.

A freehold is involved where realty is claimed by a deed regular on its face, but which is sought to be set aside as a cloud. *Chicago, etc., Seminary, v. Gage*, 109 Ill. 175.

So does a bill involve a freehold which seeks to correct a description of land in a mortgage and foreclose it. *McCarty v. Reeve*, 8 Ill. App. 44.

If the bill is sustained in this case, the necessary effect is to deprive the defendants in error of the one-fourth interest in said tracts of land as obtained by said deed.

It is considered that a freehold is involved, and the writ of error is dismissed.

Writ dismissed.

FREEMAN WIRE AND IRON COMPANY

V.

E. S. HAND.

Contracts.

1. Where there is no stated time in which a given thing is to be furnished, a reasonable time must be allowed.

2. In view of the evidence in the case presented, a recovery being sought upon a contract touching advertising, this court declines to interfere with the judgment for the plaintiff.

Freeman Wire & Iron Co. v. Hand.

[Opinion filed June 26, 1893.]

APPEAL from the City Court of East St. Louis, Illinois;
the Hon. B. H. CANBY, Judge, presiding.

Mr. JESSE M. FREELS, for appellant.

Messrs. MESSICK & RHODES, for appellee.

MR. JUSTICE SAMPLE. This suit was brought by appellee
on the following contract:

“St. Louis, Mo., June 7, 1889.

In consideration of the insertion of an advertisement, to
occupy one page, the copy of which is attached hereto, in
the book descriptive and illustrative of the Odd Fellows
Building, St. Louis, Missouri, we promise to pay E. S. Hand
\$185 on the publication and delivery to us of a specimen
copy of the same. It is agreed that the whole agreement,
including the note on the back, between the parties, is con-
tained in this contract.

FREEMAN WIRE Co.
D. I. FIELD.

\$185 in trade or work, including 100 books.”

Note on the back: “The within amount is to be applied
as a credit on the cost of future work or contract; no rebate
on work already under contract; the only house to be ad-
vertised in connection with wire work.”

The appellee obtained judgment in the court below, from
which this appeal was taken, and two points are made by
appellant:

First. That the contract was not made with the appel-
lant—“Freeman Wire *and* Iron Co.”—but with “Freeman
Wire Co.”

The evidence shows that practically the change was only
in name, and that the appellant under its present name re-
ceived the advertisement and therein advertised itself by
the name of the “Freeman Wire *and* Iron Co.”

That point is not considered well taken.

Second. That the evidence does not sustain the judg-
ment.

The contract is very peculiar and without extraneous proof is unintelligible.

The original contract was twice modified before it was accepted by appellant. It first provided that appellant should pay appellee \$185 *in money*, "in consideration of the insertion of an advertisement to occupy one page * * * in the book *descriptive and illustrative* of the *Odd Fellows Building*, St. Louis, Missouri, on the publication and delivery of a specimen copy of the same."

At the time this contract was made the appellant had a contract for the fancy wire work on the Odd Fellows Building and was then engaged on the job and had it nearly completed.

It was making a specialty of that kind of work. The appellant refused to sign that kind of a contract when the line below the signature was added, which still was not satisfactory, and finally that on the back was added.

The point of appellant's defense is that this contract, as finally completed, required appellee to furnish work for appellant to do, or to induce others to contract with appellant for the work of the kind that was being done on the Odd Fellows Building. It is claimed the company had a special department for the manufacture of that kind of wire, as well as posts and framework for the same.

The advertisement, however, shows that the company was engaged generally in the manufacture of wire goods, and had a wire mill in East St. Louis, while its other works were at 410 North Main street, St. Louis, Mo.

The appellee ordered barbed wire of the company on his contract, which order was refused on the ground above stated, and thereupon this suit was brought. D. T. Field, the secretary of this company, who made the contract with Hand, testified that Hand was to receive his pay in commissions for such kind of work brought to the company. The evidence shows that Hand was a publisher, and it does not show that he was engaged in the business of drumming up trade or securing contracts. Neither does it show what commissions he was to receive. The contract itself does not mention that fact or fix any rate. It is stated by

Field that some time after the contract was made he told some subordinate, that on contracts or work secured by Hand, he was to be allowed fifteen or twenty per cent commissions. It is somewhat singular, if the advertisement was to be paid in commissions, that the contract itself did not in some way indicate that fact.

The evidence does not show that the rate of commission that Field proposed to allow was any more than the ordinary rate. If so, what was the inducement to print the long advertisement, and in addition furnish one hundred books provided for in the contract?

It may be that Mr. Field intended the contract to be as he states. If so, it should have been expressed in the contract itself in a way, at least, to create a latent ambiguity, so that parol evidence might make the meaning plain or reasonable. But if it is conceded that the contract can be interpreted by aid of the parol evidence to mean what Field claims for it, his evidence shows that the appellant never manufactured that class of work or material used on the Odd Fellows Building, after about Christmas, 1889. In fact Mr. Field can not state that the company did any of that kind of work after the completion of the Odd Fellows Building.

The contract in suit was made on the 7th day of June, 1889, and there was no limitation of time by the contract within which the kind of work claimed by Field was required to be furnished by Hand. He would have a reasonable time to perform his part of the contract.

The company quit manufacturing that kind of work or material before that time had expired. Therefore it was in no position to demand on Hand's part that he should secure work or contracts for it that it was not prepared to fulfill.

The company had got the benefit of the general advertisement of its business, which it continued to carry on, outside of its specialty which had been dropped, and therefore should pay for it.

The judgment is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS, FOR USE, ETC.,
V.
FRANK P. GILLESPIE ET AL.

Principal and Surety—County Collector—Action on Bond—Revenue Act—Jurisdiction of Appellate Court—Chaps. 113 and 120 Ills. Stats.

1. An action brought in the name of the people of the State for the use of a given county on the official bond of a county collector to recover for alleged breaches of the conditions thereof, is not a case relating to the revenue intended by the legislature to be embraced within the scope and meaning of section 88 of the Practice Act, nor is it a case wherein the State is interested as a party or otherwise. The State is merely a nominal party plaintiff, but is not interested in the case as a State.

2. When an officer has received money, which, by the terms of the law prescribing his duties, he is required to dispose of in a specified mode by a particular time, and fails to do so, to avoid liability he must account for its proper and legal disposition.

3. The cases embraced within the meaning of Sec. 88 of the Practice Act are those only in which the question of the legality of an assessment or levy of a tax is directly in issue, or the liability of a person or persons or of a corporation to pay a tax levied is denied, and such liability is the question submitted for adjudication.

4. The Appellate Court has jurisdiction of an action upon an official bond where the legality of a given tax, or whether money received is a tax, is brought up collaterally in defense, as in the case presented.

5. A county collector and his sureties can not be heard to say that a tax levy was not properly made, or the tax collected without proper authority. Such tax being collected by the collector by virtue of his office, it is his duty to report and account for the same, and charge it to himself, as treasurer, the county being under township organization.

[Opinion filed June 26, 1893.]

IN ERROR to the Circuit Court of Richland County; the
Hon. CARROLL C. BOGGS, Judge, presiding.

Messrs. ALLEN & FRITCHEY and JOHN LYNCH, Jr., for
plaintiffs in error.

The following authorities are cited, and establish the
doctrine that when a tax collector collects taxes from the

tax-payers, he must account for the same, and can not question the legality of the tax, or his right to receive it; and that the giving of the bond, the taking the oath, and the collecting of the taxes, bind the sureties, and they are liable for any defalcation: Feigert v. the State of Ohio, 31 Ohio St. 432; Cunningham v. Mitchell, 67 Pa. St. 78; The City and County of San Francisco v. William Ford, 52 Cal. 198; Wilkinson v. Bennett, 56 Ga. 290; State of Alabama v. Lott, 69 Ala. 147; State v. Rushing, 17 Florida, 226; Ford, Treasurer, v. Clough, 8 Greenleaf Report (Maine) 334; Moore v. Allegheny City, 18 Pa. St. 55; Brandt on Suretyship, Sec. 447; Inhabitants of Orono v. Wedgwood, 44 Maine, 49; Walden v. Lee County, 60 Ga. 296; Commonwealth v. Philadelphia, 27 Pa. St. 497; Brunswick v. Snow et al., 73 Maine, 177; Clifton v. Wynne, 80 North Carolina, 145; Livingston County v. Hoover et al., 92 Ill. 575; Lovington v. Board of Trustees, 99 Ill. 527; Coons v. The People, 76 Ill. 383; The People v. Cooper, 10 Ill. App. 384; Stern v. The People, 102 Ill. 550; Cooley on Taxation, second edition, Chapter XXII, pages 704-5-6-8-9-10-11-21-22; 47 Conn. 76; 50 Maine, 347; 68 Maine, 160.

For the convenience of the court we print the decisions bearing upon this question, which are the leading cases in the sister States.

1. "Where a levy of taxes is made in excess of the rate allowed by law, and the assessment containing such excess is placed on the duplicate or tax list by the county auditor, and collected by the treasurer, and the persons by whom the tax is paid interpose no objection, the failure of the treasurer to pay over to his successor that portion of the tax illegally assessed, is a breach of his official bond, for which the sureties are liable as well as the principal." Feigert v. The State of Ohio, 31 Ohio St. 432.

2. "When a collector takes a warrant regular on its face issued by an authority having a lawful power to issue it, how can he inquire into the precedent steps and determine that in his opinion the power has not been exercised in a proper case? This determination does not belong to him,

but to the board whose warrant he must obey. Any other doctrine would put an end to the collection of taxes whenever a difference of opinion arises as to the object to which the tax is to be applied." *Cunningham v. Mitchell*, 67 Pa. St. 78.

3. "It is the duty of a tax collector, under the code, on the first Monday in each month to pay to the county treasurer all money collected by him as taxes for the State and county; even if the tax is illegal and the money paid to the collector under protest. If the tax is illegal and extortionate and paid under protest by individuals, he can not wait for a judicial determining between him and the tax-payers, but it is his duty to pay over." *The City and County of San Francisco v. William Ford*, 52 Cal. 198.

4. The collector used the orders to collect the money; he now seeks to attack them to retain it. He armed himself, as a public agent, with what was supposed to be good authority. The authority was not resisted by the tax-payers; they did not complain that the taxes were illegally assessed but paid over the money for the public use. After this has been done, can the collector be heard to say that he must keep the money because, perchance, the tax-payers may reclaim it? On the score of strict law we think the collector can not protect himself by alleging a title to this money outstanding in the tax-payers from whom it was received.

The collector is an agent and as such received the money. The public is his principal for whom it was received. *Wilkinson v. Bennett*, 56 Georgia, page 290.

5. A tax collector is under no obligation to execute a warrant irregular on its face. The tax-payers may waive any formal defects and pay their taxes to the collector; and if he receives them, the defective warrant is no defense against the claim of the town for the money actually received. The acceptance of a collector's (or tax gatherer's) bond is a sufficient consideration to cover all official delinquencies in not paying over money actually collected after such acceptance. 68 Maine, page 160.

6. This was a suit on the collector's bond, no denial of

collection of taxes, but defense was that no town clerk, selectman, assessors, treasurer, constable or collector of taxes were properly chosen, qualified and sworn in, and therefore the collector of taxes was an illegal officer and collection of taxes illegal.

Although these officers were not properly elected and qualified, if the tax-payers voluntarily paid their taxes to the collector he is bound to pay to the treasurer *de facto* the sums collected.

Action on the bond can be maintained, although the tax was raised at an illegal meeting and although the assessors were illegally chosen. (Court cites) Ford v. Clough, 8 Greenleaf, 335; Johnson v. Goodrich, 15 Maine, 29.

It is contended further in this case that the proceedings of the town were irregular, informal and illegal.

This is manifestly true. It is not often that such a medley of irregularities is exhibited in the proceedings of our municipal corporations.

But the question is, are these irregularities of such a character as to exonerate the defendants from paying over money which they have collected by virtue of those proceedings, from the citizens, and to which they have no title, equitable or legal?

The authorities as well as every moral principle negative such a proposition. 50 Maine, 347.

8. The condition of a tax collector's official bond is that he will perform all the duties of the office which are or may be required by law. The bond operates as a security, not only for honesty in paying over the money actually received, but for skill and the measure of diligence the law exacts in collecting. The real intent of the official bond expressed in a few words, in which the statute requires the conditions to be written, is, that the collector will with fidelity, skill and diligence perform the duties of the office, and keep inviolable the trusts reposed in him. The condition of the bond is broken whenever there is a default in the performance of duty, not capable of excuse, or for which excuse is not shown. Whatever of damage or injury accrues to the State from the

breach is at that instant recoverable, and the duty and liabilities to make compensation therein rests upon the several obligors, principal and sureties. The failure to collect is a breach of the bond equally with the failure to pay over the money collected. *State of Alabama v. Lott*, 69 Ala., page 147.

9. If a collector is appointed who has, unknown to the surety, previously been a defaulter in the same office, the surety can not claim release on the ground that the State has deceived him by appointing such a man. If the taxpayers voluntarily pay to the collector the amount of taxes due from them upon the assessment roll in his possession, his act in receiving the money is an official act, and his receipt is a discharge of the taxes levied as completely as though the warrant had been issued to him. The moneys he so received are taxes without reference to the warrant. The assessment and the apportionment of the amount of money required for public purposes by the proper officers, in the manner and time described by law, gives this money the character of taxes, and it is this money that the bond is intended to secure. It has been held in numerous cases that when sureties undertake that a tax collector shall pay over moneys collected by him by virtue of his office, they are liable for the money so collected whether with or without a warrant, and without regard to any irregularity in the tax list or warrant, the taxes having been voluntarily paid to him. (The court cites) 15 Maine, 29; 8 Greenleaf, 334; 44 Maine, 49; 15 Gray, 429; *State v. Rushing*, 17 Florida, page 226.

10. When the bond given by collector of taxes contained a recital that he was duly chosen, and was conditioned for the faithful discharge of his duty, it was held, in an action on the bond for not paying over money collected, that the sureties could not controvert the legality of the meeting at which he was chosen, nor the validity of his election, nor the legality of the assessment of the taxes, antecedent to their commitment to him, nor any act of the town for which they themselves would not be liable in consequence of their suretyship.

The proper action for the purpose of reclaiming such taxes, if it legally asserted, would be by an action of assumpsit against the town whose agent had received the money. (See 17 Mass. 461.)

The collector is not considered responsible for any irregularities on the part of others antecedent to the commitment of the assessment to him for the purpose of collection. His warrant is his protection against all illegality but his own. After having thus collected the money, we think he, the collector, ought not to be permitted to deny the legality of the assessments. *Ford, Treasurer, v. Clough*, 8 Greenleaf Report, Maine, 334.

13. The sureties on a bond given by the sheriff for collection of taxes can not, when sued for taxes collected and not paid over by the sheriff, contest the legality of the ordinances making the assessment. By receiving the tax roll and executing the bond, the sheriff and his sureties recognized the legality of the ordinances, and it is too late to contest their validity as to the money collected after acting under them and collecting taxes. *McGuire v. Buy*, 3 Robinson (La.), 193; *Miller v. Moan*, 3 Humphrey (Tenn.), 189.

Defects in a warrant or tax list may be a good reason for not executing the warrant, but a collector having collected money without objection by the tax-payers is liable to account therefor, and his sureties can not, by reason of such defects, excuse themselves from paying the money collected by the principal in the bond wherein they have bound themselves that he shall, well and faithfully, perform all the duties of his office. *Inhabitants of Orono v. Wedgewood*, 44 Maine, page 49.

14. The collector can not attack the validity of the orders under which he has collected the county tax, as a reason for not paying the money over, even if they were illegal. *Walden v. Lee County*, 60 Ga. 296.

15. It is not by any means clear that a public officer charged with the duty of collecting a tax can be permitted to deny his own power after having exercised it. Shall he be allowed to assert that a tax is chargeable when he de-

mands it from the citizens and then say it is not chargeable when the State demands it from him? It seems much more just and reasonable to require that every agent of the commonwealth who receives money for her in the shape of taxes should pay it over and let the aggrieved party make his appeal to the State himself. *Commonwealth v. Philadelphia*, 27 Pa. St. 497.

16. This is an action upon a bond given to secure the fidelity of the principal, as collector of taxes for the town of Brunswick. It is admitted in the bond that he was duly appointed as such. The principal makes no defense. The sureties defend on the ground that the warrant under which the taxes were collected was defective, and therefore illegal; that this was the fault of the town, and that the town ought not to derive a benefit against an innocent party, when itself guilty of neglect and illegal proceeding in the matter which is the foundation of the claim. The defect in the warrant is admitted; but that defect is not the foundation of the claim made here.

The taxes not collected are not claimed, but those which have been. The defect excuses the collector from collecting, but does not excuse him from paying over what is paid to him.

This still remains a duty devolved upon him by virtue of his office. It was optional for him to proceed in the collection of taxes, and exhaust what authority was given him for that purpose, or decline to do so. But electing to proceed, as he did in this case, he must proceed as collector, and can do so in no other capacity. Whatever money he receives upon the taxes, he receives as collector. The condition of the bond is that "if the principal shall well and faithfully perform the duties of his said office, then this obligation to be void, otherwise to remain in full force."

If there has been a failure to pay over the money collected, there has in that respect been a failure to perform the duties of his office, and a breach of his bond. If there has been a breach on his part, the sureties must be equally liable with the principal. That is the covenant which they made, the

contract to which they became parties. In *Boothbay v. Giles*, 68 Me. 162, it is said that "a bond conditional for the faithful performance of the duties of collector, will hold him and his sureties to pay over money which he has collected after the delivery of the bond." This principle is fully sustained by the cases cited as well as by later ones. If there is such a failure to pay over as is claimed in this case, and which the evidence tends to show, the action can be maintained against the sureties, as well as against the principal. *Brunswick v. Snow et al.*, 73 Me. 177.

17. "It is quite clear that unless this money can be recovered for the use of the county, it can not be recovered at all. Nor, in our opinion, however improper was this intermixing of funds due different political bodies, has the county thereby lost its right to claim and recover what was in fact assessed for county purposes. The officer was aware that half the county tax had been placed in the wrong column, and the reasons for so doing, and this information, easily arrived at, also by a single calculation enables him to discriminate between the sums due to the State and to his county. This sum actually collected for county purposes and upon a county assessment, must be paid to the county authorities for the use and benefit of the tax-payers and others therein. To deny the relator's right of action, is to affirm the right of the collector after receiving, by virtue of his office, a large sum from the tax-payers, to retain and appropriate half to his own use without accountability to any one; a doctrine alike repugnant, in the words of Shaw, C. J., "to the rules of law and justice." *Clifton v. Wynne*, 80 North Carolina, 145.

Messrs. HUTCHINSON & VAN HOOREBEKE, for defendants in error.

The clerk is a mere ministerial officer, and has no such power. *Beckwith v. English*, 51 Ill. 148; *Ramsey v. Hoeger*, 76 Ill. 443; *Mix v. The People ex rel.*, 72 Ill. 241. In the latter case the court say: "The levy of a tax is in its very nature despotic, and is liable, from a variety of causes,

to serious abuse, and hence its exercise is always guarded with care. The power in such officers being delegated by the law, they must be held to exercise it within the limits of the law * * * and all their acts beyond the scope of the power delegated are void," etc. Cooley on Taxations, 2d Ed., p. 423.

In the case of Town of Virden v. Needles, 98 Ill. 370, the court use this significant language: "The money thus in the hands of the respective treasurers is either there by authority of law, or it is there without authority of law. If it is there by authority of law it is revenue for the payment of the bonds and coupons issued, etc. * * * If it is there without authority of law it is not revenue at all, and belongs to the several tax-payers by whom it was paid." In the case of President, etc., v. Senger, 34 Ill. App. 223, the court say: "But where the tax has been collected for some special purpose, and for some reason the purpose has failed, and the money can not be paid out on any other account, then we think the officer becomes the bailee of the party paying the money, and should pay it over to the taxpayer on demand," etc. See also Shoemaker, Auditor, v. Com'rs of Grant County, 36 Ind. 175; this case is full and to the point; Mix v. The People, 72 Ill. 241; Gurnee v. City of Chicago, 40 Ill. 169; The State v. Allen, 43 Ill. 456; we might cite many more cases to the same effect, but we refrain. But we have digressed by our illustration from the real points at issue, and as the French say, "Revenons, a nos moutons."

We should not, however, confound matters and lose sight of the distinction that the sureties are only liable for the acts of their principal done *virtute officii*, and not for acts done *colore officii*. Ripley v. Gelston, 9 Johns. 201; Gerber v. Ackley, 37 Wis. 43; The People v. Schuyler, 4 N. Y. 187; State v. McDonough, 9 Mo. App. 63; Story on Agency, Sec. 309 and 311; The People v. Toomey, 25 Ill. App. 46.

The liability of a surety is limited to the express terms of the contract, the obligation is construed strictly and favorably to him (Ward v. Stahl, 81 N. Y. 406), and in cases

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of doubt is resolved in favor of the surety. The liability is not extended by construction or implication. The People v. Toomey, 25 Ill. App. 46; Stull v. Hance, 62 Ill. 52; Phillips v. Singer Mfg. Co., 88 Ill. 305; Dodgson v. Henderson, 113 Ill. 360; Dodge v. The People, 113 Ill. 491; The People v. Toomey, 122 Ill. 315; The People v. Foster, 133 Ill. 496.

The sureties are only liable on the bond for all taxes collected or received by virtue of law (Starr & C. Ill. Stat., Chap. 120, Sec. 258, p. 2113), and these statutory provisions are incorporated and a part of the bond. See also Cooley on Taxation, 2d edition, page 715.

Testing these breaches, the first and second, in the light of the authorities cited, we insist that a levy of taxes, *i. e.*, the rate per cent certified to by the auditor, should have been averred, which, under the law, is the levy for the county clerk to extend, so that the court might see what had been done; for any extension by the clerk beyond the rate certified, *i. e.*, the levy, was illegal and void, to that extent at least. Hubbard v. Brainard, 35 Conn. 563; Cooley on Taxation, 2d Ed., p. 429, 553; The State v. Allen, 48 Ill. 456; Mix v. The People, 72 Ill. 241.

But as to the necessity of averring a levy we are not without authority directly in point. Whitfield v. Woolbridge, 23 Miss. 183; Greenwell v. The Commonwealth, for use, etc., 78 Ky. (1 John Rodman) p. 320; Coons v. The People, 76 Ill. 389. In the latter case the court say: "It is insisted that appellees failed to make a case against appellants; that the order levying the tax should have been read in evidence. The evidence shows there was a bounty tax levied * * * and it does not seem during the whole trial to have been questioned, but to have been conceded * * * and the whole line of defense concedes it. Under these facts we think the court has ample evidence that the tax was levied, and moreover several of the pleas admit the tax was levied."

The conclusion is irresistible that if a demurrer had been filed to the declaration for the want of an averment of a levy the court would have sustained it. If it was necessary to prove it, it was necessary to aver it.

MR. JUSTICE GREEN. This action was brought by plaintiffs in error for the use of Richland County, against Frank P. Gillespie, and the sureties upon his official bond as county collector of said county, to recover for alleged breaches of the condition of said bond. Defendants below interposed a general and special demurrer to plaintiff's declaration, which demurrer the court sustained, and plaintiff elected to abide by the declaration and sued out this writ of error. Defendants in error entered their motion in this court to dismiss the writ and proceedings for want of jurisdiction, and assigned, in support of such motion, two reasons. "First. This is a case relating to the revenue, within the meaning of Sec. 88 of the Practice Act." "Second. The State is interested as a party, or otherwise."

We overrule the motion, and hold that this is not a case relating to the revenue intended by the legislature to be embraced within the scope and meaning of said section, nor is it a case wherein the State is interested as a party, or otherwise, as we understand and construe that section. The State is a nominal party plaintiff, but is not interested in the case as a State. The party interested is Richland County, for its use the suit is brought, and the money sought to be recovered is money that should have been paid over into the county treasury by the collector. Counsel for defendants cite and rely upon certain sections of the Act entitled "Railroad and Improvement Aid Bonds," and the amendments thereto, to sustain the contention that this is a case wherein "the State is interested as a party, or otherwise." The evident purpose of this act is to authorize the issue of new bonds in the place of old ones, given for the indebtedness of counties and other municipalities. To provide for the registration thereof, and for raising, by taxation, sums sufficient to pay annual interest and the principal thereof, which sums are, by the terms of the act, pledged and appropriated to the payment of such annual interest and principal. The State has no interest in said bonds, and incurs no liability by reason of the issuance and registration thereof, but is custodian only of the

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moneys raised by such taxation when collected and paid over to the proper State officer.' Par. 16, Sec. 5, Chap. 113, Starr & C., Ill. Stats. This tax is in no proper sense a revenue of the State, but when so collected and paid over, it is a fund to be disbursed to the holders of the bonds, and which, by the very terms of the act, could not be paid out for, or appropriated to any State purpose. In this connection we will refer to the question (irrelevant, as we think, to the motion, however,) raised on behalf of defendants, as to the right of the State auditor only, to maintain this suit.

Holding, as we do, that no part of the money sued for is a fund in which the State has an interest, Sec. 259, Chap. 120, entitled "Revenue," cited by counsel for defendants, and conferring power upon and making it the duty of the auditor to sue the collector and sureties upon his bond, etc., and take all such proceedings, etc., as may be necessary to protect the interests of the State, has no application.

Sec. 262, same act, confers power upon cities, towns, villages or corporate authorities to prosecute suit against any collector collecting or receiving funds for their use, by suit upon the bond in the name of the people for their use. The other ground for sustaining the motion is equally untenable. This is not a case "relating to the revenue within the meaning of Sec. 88 of the Practice Act," but the cases embraced within such meaning are those only, in which the question of the legality of an assessment or levy of a tax is directly in issue, or the liability of a person or persons, or of a corporation, to pay a tax levied, is denied, and such liability is the question submitted for adjudication. Of this class of cases are *Kilgour v. Drainage Commissioners*, 111 Ill. 342; *Phoems v. Gleason*, 23 Ill. App. 373, and *Webster v. People*, 98 Ill. 333, cited on behalf of defendants, and our attention has not been called to any case in which suit was brought upon the bond of a collector, sheriff or treasurer (even where the legality of an assessment, levy or tax was collaterally brought in question as a defense) and the juris-

diction of the Appellate Court was denied or challenged. To the contrary, in *People v. Hoover*, 92 Ill. 575; *Livingston v. Trustees*, 99 Ill. 564; *People v. Cooper*, 10 Ill. App. 384; in each of which cases the suit was brought upon an official bond, and the legality of the tax, or whether the money received was a tax, was brought up collaterally in defense, as in the case at bar; yet the Appellate Court took jurisdiction, and the Supreme Court also took jurisdiction to try the two first named cases on appeal from Appellate Court without questioning the jurisdiction of the latter court. One more query in this connection remains to be answered.

Counsel for defendants in their brief filed with the motion say: "We think this makes it a case relating to the revenue. But if the court should think that the defendant's position is not sound, is this the proper court to decide the question?"

In reply to this, it seems to us that if it is proper for this court to decide the question in case our decision should be favorable to the defendants, and this seems to be conceded, there can be no impropriety in our deciding the question even if the result should be unfavorable. Inasmuch as the question was submitted unconditionally, and believing it to be our duty to decide it, we have adopted that course and reached the conclusion before stated.

The only other matter to be considered is the action of the trial court in sustaining the demurrer to the declaration. It is in said declaration averred that Gillespie and the other named defendants, on December 31, 1884, executed and acknowledged their writing obligatory in the penal sum of \$56,000, which was approved by the chairman of the county board, the county judge, and the county clerk of said county on January 13, 1885, and recorded by the county clerk and the original deposited with the auditor; that the condition of the writing obligatory was and is, that said bounden Gillespie shall perform all the duties required of him and to be performed as collector of taxes for the year 1884 for said county in the time and manner prescribed by law, and when he shall be succeeded in office, shall surrender and deliver up all books, papers and money appertaining to his office as col-

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lector; that at the date of the execution of said writing obligatory, Gillespie took the oath of office required by law, and entered upon his duties as collector of taxes as aforesaid, he then being the treasurer of said county, duly elected and qualified, and then and there *ex officio* collector of taxes for 1884, within and for said county; that said Gillespie did not faithfully discharge and perform all the duties required of him as such collector for 1884, in the time and manner prescribed by law, nor deliver up all books, moneys and papers pertaining to his office, as collector, to his successor, nor to the person or persons authorized to receive the same. Three breaches are assigned, as follows: And for assignment of a breach of the conditions of said writing obligatory, the plaintiff says that said Frank P. Gillespie failed, neglected and refused on or before the 10th day of April, 1885, to make a sworn statement of the total amount and kind of taxes received by him as such collector of taxes for said county, for the use and benefit of said county, either by himself or from the town and district collectors of said county; omitted and neglected to so report, and make a sworn statement of a large amount of money collected by him, to wit, the sum of \$20,762.42, of taxes collected by him for the year 1884, which had therefore been extended on the tax books for said year by the county clerk of said county for collection; and said Frank P. Gillespie, as collector, in his final settlement with the county board and county clerk of said county, failed, neglected, and refused to report and account for a large sum of money, to wit, \$20,762.42, which he had collected, as such collector, for the use of said county, for the purpose of making payment of interest on certain bonds of the county of Richland, which tax had been extended on the collector's books by the county clerk; and said Frank P. Gillespie, as collector, only accounted for and paid over for the purpose aforesaid the sum of \$20,162.16, and retained the balance to his own use.

And for further assignment of a breach of the writing obligatory, the plaintiff says that the county of Richland owed certain registered bonds, and pursuant to law the

auditor of the State of Illinois certified to the county clerk of Richland County the amount to be raised by taxation for that year to meet said outstanding obligations, and that the county clerk extended on the tax books of Richland County for said purpose the sum of \$20,762.42; that the same was collected by said Frank P. Gillespie, as collector aforesaid; that upon settlement with the auditor and treasurer of the State of Illinois as required by law, said Frank P. Gillespie paid to the treasurer of the State of Illinois for the purpose aforesaid, the sum of \$20,158.16; that there still remains in the possession of Frank P. Gillespie, as collector, the sum of \$604.26, collected over and above the amount demanded for the purpose of paying interest on said bonds, and said Frank P. Gillespie failed, neglected and refused to account for and pay over to himself, as treasurer of Richland County, said sum of \$604.26, but converted the same to his own use. And for further assignment of the breach of the condition of said writing obligatory, said plaintiff says that in settlement with the board of supervisors of said county, as collector of taxes for the year 1884, he, the said Frank P. Gillespie, as such collector, charged and received credit in his settlement with the board of supervisors the following sums of money to which he was not entitled, to wit:

Errors and abatements, R. R. B. tax.....	\$ 13.92
Insolvencies, R. R. B. tax.....	45.59
Errors and abatements, county tax.....	15.38
Insolvencies, county taxes.....	39.18
Over credit April vouchers.....	10.00
Over salary.....	261.95

Making total credits.....\$386.02
erroneously allowed in his settlement with said board of supervisors, which said sums belonged to the county of Richland.

The declaration concludes with proper averments.

To this declaration the defendants interposed the following demurrer: "Now come the defendants, by T. W. Hutchinson, attorney, and demur to the declaration filed in said cause and to each of the so-called breaches of the conditions

of said bonds, and say that the same are, and each of said breaches is, insufficient in law.

They also assign the following special causes of demurrer, to wit:

First. The first breach does not state the amount of tax that was levied for county purposes in the year 1884.

Second. It does not show that the so-called tax was extended by virtue of any levy for county purposes.

Third. The statement that the moneys named were for the use of Richland County, is only the legal opinion of the pleader. The fact that a levy of taxes for county purposes was made, and the amount of it, or the rate and equalized valuation of the property in the county, ought to be set forth so that the court can see whether the same is county funds, for which this suit will lie.

Fourth. The second alleged breach is defective, in not stating what amount or rate was levied for county purposes for that year.

Fifth. In stating only the pleader's conclusion of the ownership of the fund sued for, not stating the amount of levy, nor indeed that there was any levy, the levy, the rate or amount thereof, the equalized valuation of property in said county, should be shown, and all other facts (not conclusions), so that the court can see and determine the proprietorship of all funds.

Sixth. The statement that the auditor certified to the county clerk the amount required to pay interest on registered bonds, pursuant to law, is bad on its face. The law requires the auditor to certify the number of cents on each \$100 to be extended by the county clerk. The plaintiff ought to be required to state the facts and not to be allowed to avoid them by a general statement, as was done here.

Seventh. The third breach contains items not chargeable to the defendants in any case. Some of them are proper charges (if true) in an account with a treasurer, but not proper charges against a collector.

Eighth. The item of over salary is not a matter of suit on a collector's bond and ought to be stricken out.

Ninth. The several breaches assigned fail to state the valuation of property as equalized in Richland County. This is necessary, because fraud is relied upon by the plaintiff, and without a knowledge of this, as well as the amount of levy, the pleading does not put the court in possession of the necessary facts.

Tenth. In the third assignment of breach the charge of \$261.95 for over salary, and the charge of \$10 of over credit on April vouchers, are both matters not chargeable in an action on a collector's bond.

The other four items charged in said breach are chargeable in this suit, being matters arising upon a tax levied to pay interest on registered bonds, and the levy is a State matter and settled with the auditor of the State instead of the county board, wherefore defendants pray judgment, etc.

T. W. HUTCHINSON,

WITCHER & VAN HOOREBEKE."

Counsel for defendants devote much space of their printed argument upon this branch of the case, to a discussion of the same matters already disposed of by us in deciding the motion to dismiss this appeal. They contend again that by the provisions of Chap. 113, "Railroad and Improvement Aid Bonds," and Chap. 120, "Revenue Act," the sum claimed in the first and second breaches assigned was part of the State fund and should have been paid to the State treasurer, and on failure to make such payment the State auditor must bring this suit as provided in Secs. 259 and 260 of the Revenue Act. We hold adversely to this contention and have given our reasons therefor, hence it is unnecessary to go over the same ground again.

In the first breach assigned it is averred that Gillespie failed, neglected and refused, on or before the 10th day of April, 1885, to make a sworn statement of the total amount of taxes received by him as such collector of taxes for said county, for the use and benefit of said county; omitted and neglected to so report and make a sworn statement of \$20,762.42 of taxes collected by him for 1884, which had theretofore been extended on the tax books for said year by

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the county clerk for collection, and as collector in his final settlement with the county board and county clerk, failed, neglected and refused to report and account for \$20,762.42, which he had collected as such collector for the use of said county, to pay interest on certain bonds of Richland County, which tax had been extended on the collector's books by the county clerk, and Gillespie as collector, only accounted for and paid over for the purpose aforesaid, \$20,158.16, and retained the balance to his own use.

The special grounds for demurrer set up to this breach are: "That it does not state the amount of tax that was levied for county purposes in the year 1884." "It does not show that the so-called tax was extended by virtue of any levy for county purposes." "The statement that the moneys named were for the use of Richland County, is only the legal conclusion of the pleader. The fact that a levy for county purposes was made, and the amount of it, or the rate and equalized valuation of the property in the county, ought to be set forth so that the court can see whether same is county funds, for which this suit will lie."

The first breach is not obnoxious to the special demurrer upon the grounds set forth and relied on. It was unnecessary to aver said tax was extended by virtue of any levy. The averment that Gillespie had collected the money named as such collector, for the use of the county, was not a conclusion of law, but an averment of fact admitted by the demurrer to be true, and it was not necessary to set out that a levy for county purposes was made, and the amount of it, or the rate and equalized value of the property in the county. Without such averments, a good cause of action is set up in this breach. By sufficient averments it appears that Gillespie had failed, neglected and refused to perform duties as collector, required of him by the statute, and violative of the condition of the bond sued on; that as such officer he had failed, neglected and refused to report and account for a balance of \$604.26 remaining in his hands as collector, of taxes collected by him as such collector, for 1884, for the use of the county, and retained that sum to his own use.

He and his sureties can not be heard to say the levy was not properly made, or the tax collected without proper authority. He collected and received it by virtue of his office, and it was his duty to report and account for the same and charge it to himself as treasurer. In *People v. Hoover*, 92 Ill. 575, it was held when a treasurer in counties under township organization receives taxes belonging to the county, he will be considered as holding the same as collector until he reports them to the county clerk, as required by Sec. 120 of the Revenue Act, and his sureties are liable. The bond of collector secures the performance of duties not covered by his bond as treasurer.

In *Lovingston v. Trustees*, 99 Ill. 564, it was insisted the law misappropriated the fund collected by defendant, Lovingston, as township treasurer, and the board had no constitutional rights to the fund, hence could not recover even if Lovingston was not entitled to it. *Held*, that even if trustees were not entitled to it, he received it for them as their officer, and if the corporation was not entitled to it, still the corporation would be liable to refund it and should have the money to meet the liability, and the treasurer had no right to hold the money.

In *People v. Cooper*, 10 Ill. App. 384, one of the defenses relied on was that part of the sum Cooper collected, as collector, was levied without authority of law, and the city could not recover. *Held*, that if there was irregularity in the levy of the tax, the collector could not raise the question when he was called upon to pay over what he had collected. He had received the money for the use of the city and he should account for it. That it was not material that those from whom he had collected it might have resisted payment. Citing *Cooley on Taxation*, 498-9, and cases there cited; *Burroughs on Taxation*, 264; *Coons v. People*, 76 Ill. 390; *Lovingston v. Trustees*, *supra*. In the opinion it is also said: "Were this a proceeding between the tax-payer on the one side and the collector and city on the other, to prevent the payment of the tax, or the application of it after its collection, then the question would

properly arise whether it was levied and collected according to law," and *Virden v. Needles*, 98 Ill. 370, would be in point. But such is not the case under consideration. This is only a case where the city is calling upon the collector to pay over money which he has collected for its use, and in such a proceeding he can not object that the tax was collected without proper authority. The distinction is thus clearly drawn between cases of this character and cases cited by defendants wherein a taxpayer is resisting the collection of an illegal tax, and greater particularity is required in averments of the declaration.

It also suggested that said breach is double and repugnant. "Double, because the failure to report should be averred in a separate breach; so the failure to account. Repugnant, because it avers his failure to report and account for \$20,762.42 for the use, etc., and in the next clause it avers that he did account for \$20,158.16 of that sum, and retained the balance." The special demurrer does not include these objections and they can only be raised by special demurrer.

It is further urged that there is no averment in either of the three breaches of a demand upon Gillespie, as required by Sec. 245 of the Revenue Act. That section provides that suit may be brought upon collector's bond if he fails to make the reports and payment required, by preceding sections, *within five days* after the time specified, or after demand made. If demand was necessary, which we do not concede, it could only be required in case it was desired to bring suit before the expiration of the five days; after that period, the collector, failing to make reports and payments as required, would be in default without demand made.

But we understand when an officer has received money, which, by the terms of the law prescribing the duties, he is required to dispose of in a specified mode by a particular time, and fails to do so, then to avoid liability he must account for its proper and legal disposition. *Coons v. People*, 76 Ill. 383. The special causes of demurrer to the second breach assigned are substantially like those in the special

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demurrer to the first breach, and for the reasons already given, we think the general and special demurrer was improperly sustained to said second breach. The demurrer to the third breach assigned was properly sustained. Some of the items therein averred were proper charges against defendant in his account as county treasurer, but for which the sureties upon his collector's bond are not liable. We do not wish to be understood, however, as deciding that the item "over salary" is included among the items for which defendants are not liable.

The judgment is reversed for the error in sustaining the general and special demurrer to the first and second breaches assigned, and cause remanded.

Reversed and remanded

McCORMICK HARVESTING MACHINE COMPANY

V.

ROSA ADELE.

Appeal and Error—Variance—Real Property—Injury to Railroad Embankment.

1. The rule is inflexible that in order to take advantage in an appellate court of any improper ruling of the trial court which does not relate to the pleadings, or appear upon the face of the judgment itself, the improper ruling and exception thereto must be preserved in and by a proper bill of exceptions.

2. Errors assigned in the case presented, challenging the correctness of the rulings of the trial court in refusing to set aside the verdict of the jury and refusing to grant a new trial, will not be considered, the motion for a new trial set out in the bill of exceptions being followed by the statement in substance that the defendant then and there excepted "to such judgment," it not appearing that any exception was taken to the action of the court overruling the motion for a new trial.

3. The question of variance between the evidence and the declaration in a given case can not be raised where no objection and exception was interposed to any evidence introduced.

McCormick Harvesting Machine Co. v. Adele.

4. In an action brought to recover for injury done real property through building a railroad embankment in front thereof, this court holds that there is nothing in the contention that plaintiff is bound to prove title in fee simple under the averment that she was the owner and possessor of the lot, and that it would be enough if she proved she was in possession thereof, and was injured in her peaceable possession, and thus damaged by a wrongdoer, and all these facts were proven by evidence not excepted to, and that at least after verdict, a recovery would be sustained. In tort a plaintiff may prove a part of his charge and recover.

[Opinion filed June 26, 1893.]

APPEAL from the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

MESSRS. COCKRELL & MOYERS, attorneys for appellant.

MESSRS. M. MILLARD and JESSE M. FREELS, for appellee.

MR. JUSTICE GREEN. The judgment appealed from was for \$850 damages and costs of suit against appellant for the injury and damage to appellee resulting from the construction and maintenance of an embankment and railway track by appellant in front of the premises of appellee in the city of East St. Louis. The following errors are assigned :

First. The court erred in admitting improper testimony on the part of the plaintiff.

Second. The court erred in refusing to admit proper testimony offered on the part of the defendant.

Third. The court erred in giving improper instructions to the jury on the part of the plaintiff.

Fourth. The court erred in refusing to properly instruct the jury on the part of the defendant.

Fifth. The court erred in not setting aside the verdict of the jury.

Sixth. The court erred in refusing to grant a new trial to the defendant.

Seventh. The court erred in rendering judgment for the plaintiff and against the defendant.

The bill of exceptions does not show that any exception

was taken on behalf of appellant to the ruling of the trial court in admitting or refusing to admit evidence, or in giving or refusing to give instructions, hence we can not consider the first, second, third and fourth errors assigned. The rule is inflexible that in order to take advantage in an appellate court of any improper ruling of the court during the trial of a cause which does not relate to the pleadings or appear upon the face of the judgment itself, the improper ruling and exception thereto must be preserved in and by a proper bill of exceptions. *Martin v. Foulke*, 114 Ill. 206; *Graham v. People*, 115 Ill. 566; *Fireman's Ins. Co. v. Peck*, 126 Ill. 49; *Steffy v. The People*, 130 Ill. 98.

The fifth and sixth errors assigned challenge the correctness of the rulings of the trial court in refusing to set aside the verdict of the jury, and refusing to grant a new trial.

In the bill of exceptions the motion for a new trial is set out, and then follows this statement: "But the court overruled the motion and rendered a judgment in accordance with the finding of the jury. To the rendition of which judgment the defendant then and there excepted." By this language we understand it was the rendition of the judgment that defendant excepted to, and no exception was taken to the action of the court overruling the motion for a new trial. The overruling of the motion was one act, preceding another distinct and separate act, viz., "rendering judgment in accordance with the finding of the jury," and an exception to the latter does not reach back and apply to the former ruling. Such being the condition of the record we feel precluded from the consideration of the fifth and sixth errors assigned. The seventh and last error assigned is, rendering judgment for the plaintiff and against the defendant. No suggestion is made that the judgment is technically defective either in form or substance, and the verdict having been sustained by overruling the motion for a new trial without exception, a judgment for the amount of damages assessed and costs, must necessarily and properly follow, and the seventh error is not well assigned. In the printed argument filed on behalf of appellant it is insisted

the judgment should be reversed because the averment in plaintiff's declaration is, that she was the owner and possessor of the lot in question, and the proof is she was a tenant for life; hence there was a fatal variance between the *allegata* and *probata*; that furthermore she could not recover for injury to her possession under said averment, but was required to prove ownership in fee as well as possession, and that as life tenant she could not recover if the owner in fee of said lot could not recover, and that the evidence showed the property was increased in value by the building of the railway switch and therefore the owner in fee could not have maintained a suit against appellant for the construction of it. If the condition of the record permitted us to examine and decide the questions thus presented we could not sustain the contention that the judgment ought to be reversed, for the reasons suggested. The question of variance cuts no figure, inasmuch as no objection and exception was interposed to any evidence introduced. There was a conflict of evidence as to the effect of building the embankment and switch in so far as it affected the value of the premises; therefore it can not be assumed, as appellant insists, that the evidence establishes the fact that the property was thereby increased in value. As to the other point, that plaintiff was bound to prove title in fee simple under the averment that she was the owner and possessor of the lot, it would seem, if she proved she was in possession thereof, and was injured in her peaceable possession and thus damaged by a wrongdoer, and all these facts were proven by evidence not excepted to, that at least after verdict, a recovery would be sustained. In tort a plaintiff may prove a part of his charge and recover. Ill. & St. L. R. R. Co. v. Cobb, 94 Ill. 55.

We discover no reason for reversing the judgment and it is affirmed.

Judgment affirmed.

EAST ST. LOUIS ELECTRIC STREET RAILROAD COMPANY

V.

JENNIE STOUT.

47	546
150s	9
47	546
69	438
69	675

Street Railways—Negligence—Personal Injuries—New Trial.

1. Assignments of error, not discussed in the argument upon appeal, must be considered waived.

2. No exceptions being preserved as to instructions, this court will not consider errors assigned thereon.

3. In the case presented, the trial having been before a jury, the trial court overruled the motion for a new trial, and rendered a judgment in accordance with the finding of the jury, to which rendition the appellant excepted; no exception having been saved as to the ruling upon such motion, the court holds that the errors assigned can not be considered by it.

[Opinion filed June 26, 1893.]

APPEAL from the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Messrs. COCKRELL & MOYERS, for appellant.

Messrs. JESSE M. FREELS and A. FLANNIGAN, for appellee.

MR. JUSTICE SAMPLE. The appellee recovered a judgment for the sum of \$1,000 for an injury alleged to have been caused by the negligence of the appellant. There are seven different assignments of error. The first four relate to the admission and refusing to admit evidence, the giving and refusing to give instructions. The first two, relating to the ruling of the court as to the admission of evidence, are not discussed in the argument, and are therefore considered waived: No exceptions were preserved as to the instructions and therefore we are precluded from considering those errors assigned.

The other errors are as follows:

Fifth. The court erred in not setting aside the verdict of the jury.

Sixth. The court erred in not granting to the defendant a new trial.

Seventh. The court erred in rendering judgment on the verdict of the jury.

The only exception preserved, which is claimed by appellant to authorize the foregoing assignments of error, is as follows:

“But the court overruled the motion (for new trial), and rendered a judgment in accordance with the finding of the jury. To the rendition of which judgment the defendant—appellant—then and there excepted.” This case was tried before a jury, hence, to affect the verdict, it was necessary that a motion for a new trial should be made. It is not necessary to cite authorities on such a point. This motion was made and the reasons in writing are preserved in the bill of exceptions. This motion was overruled by the court, to which ruling no exception was preserved in the bill of exceptions—the only place the exception can be preserved. *Gould v. Howe*, 127 Ill. 251.

The exception was preserved to the rendition of the judgment.

The overruling of the motion for a new trial and the rendition of the judgment on the verdict are separate and distinct steps in the trial.

The fact that these are successive steps, does not render them any the less distinct, than if they had been the first and last steps of the trial.

The exception does not purport to be to the action of the court, in overruling the motion for new trial and in rendering judgment on the verdict, but the exception is confined to the action of the court in rendering judgment on the verdict. The case having been tried before a jury, such an exception could be of no avail to the appellant, and it was a proceeding unknown to the practice.

The statute clearly requires an exception to be preserved to the decision of the court overruling the motion for new

trial. Sec. 61, Chap. 110, Ill. Stats., provides that "exceptions taken to decisions of the court overruling motions for new trials, shall be allowed; and the party excepting may assign for error any decision *so excepted*." We feel constrained to hold that the exceptions preserved in this record do not permit us to consider the errors assigned.

Judgment affirmed.

LEWIS KAMP

V.

THE BRANCH CROOKS SAW COMPANY.

Negotiable Instruments—Note.

In an action brought upon a promissory note given under a certain contract, whereby the payees agreed to indemnify the maker against liability as guarantor of certain bonds, defendant setting up the non-performance of the condition of the indemnifying bond, this court holds that such defense, if true, would be no defense to the case presented; that the demurrer to said plea was properly sustained; that there is nothing in the error assigned as to the manner of entering judgment herein, and that the same must stand.

[Opinion filed June 26, 1893.]

APPEAL from the County Court of Wabash County; the Hon. H. J. HENNING, Judge, presiding.

Mr. M. F. HOSKINSON, for appellant.

Messrs. MUNDY & ORGAN, for appellee.

MR. JUSTICE GREEN. The bill of exceptions does not purport to contain all the evidence introduced by both parties during the trial, hence the only errors assigned that we can rule upon, are the first and third. The first error assigned is:

"The court erred in sustaining the plaintiff's demurrer to the third plea. The plea avers that the note sued on was made

Kamp v. Branch Crooks Saw Co.

by defendant in consideration of the giving of an indemnifying bond by the payee and others, to defendant and others, who, as guarantors, were liable for the payment of eight bonds of \$5,000 each, issued by the Standard Manufacturing Company of Mt. Carmel, Illinois. That by the condition of said indemnifying bond the obligors were to pay the eight bonds, if the corporation failed to do so, and were to indemnify said guarantors against the payment thereof. That \$15,000, principal and interest of said bonds is due, and the obligors in the indemnity bond failed and refused to pay the same, by reason of which failure suit was brought on said corporation bonds. That said suit is still pending, and appellant is one of the defendants.

By the averments of this plea it is manifest the payment of the note was not made dependent upon the performance of the condition in the indemnity bond, or that a failure to fulfil such condition should release the maker.

The execution and delivery of the bond to said guarantors and the risk and burden assumed by the obligors, was the consideration for the note, and is still retained by appellant and his co-guarantors. If a judgment is rendered for plaintiffs in the suit on the corporation bonds, and the obligors in the indemnity bond fail to perform the condition, and the obligees are thereby damnified, the latter can maintain a suit and recover their damages for the breach of such condition. The averments of the plea set up no legal defense to the note sued on, and the demurrer was properly sustained. The third error assigned is: "The court erred in entering judgment for the amount found due on the note, and the amount found due as attorney's fees separately."

As we understand the record, the judgment entered is an entirety for the sum of \$268.75, made up of two items: \$245.83, the amount found to be due on the note, and \$22.90 for attorney's fees. The judgment is for a sum certain, and the payment of that sum would discharge appellant from all liability in respect of the cause of action set up in the declaration.

The third error is not well assigned and the judgment is affirmed.

Judgment affirmed.

FERDINAND EHRLER

V.

JANE WORTHEN.

Negotiable Instruments—Notes—Consideration—Failure of.

1. Where a husband acts as the agent of his wife in a business transaction, the knowledge he acquires while so acting, is, in law, the knowledge of the wife.

2. The question of the interpretation of a written contract is for the court.

3. Declarations of an agent, made at a time when not engaged in the transaction of the principal's business, are not admissible as original evidence against the principal. The act and the declaration must unite in order to make such declarations original evidence.

4. No contingent event that *may* happen after the transfer of a promissory note, can affect its negotiability.

5. In an action brought to recover upon a promissory note, the plaintiff being the assignee thereof, the same being given for one year's rent of a certain farm rented under a five years' lease, it providing that in case of damage from high water the rent should be reduced according to the damage done, the fact being, that no damage from such cause occurred until after the transfer of the note, this court holds, said note having been transferred as collateral security for an indebtedness less than its face, that as to such sum the judgment for the plaintiff could not be disturbed, but that as to the residue, any defense could be interposed as to the assignee, that could have been raised between the original parties.

[Opinion filed June 26, 1893.]

APPEAL from the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBARTS, Judge, presiding.

Mr. R. J. STEPHENS, for appellant.

Messrs. SMITH, McELVAIN & HERBERT, for appellee.

MR. JUSTICE SAMPLE. Appellee, as assignee of a note made by appellant to Vanover, of date August 27, 1891,

Ehrler v. Worthen.

due one year after date, for \$500, given for the rent of a farm, brought this suit and obtained a verdict for \$365, which was sustained by the court.

The defense, set up by special plea, was that the consideration of the note was the yearly rental of a farm, located in the Mississippi bottom, which was subject to overflow, and that the written lease therefor, which was concurrent with the note, provided that in case the water did overflow or damage the crops on said land, then that the rent should be reduced according to the damage done; that before said note matured, the water did overflow said land, and damaged the crops thereon to the amount of \$1,500, whereby the consideration of said note has wholly failed, and that the plaintiff, before the assignment of the note to her, had full notice, etc.

The evidence shows the following state of facts: that Simon Worthen, the husband of the plaintiff, was security for the lessor, Vanover, on a note to the Harrison Machine Works, on which judgment had been taken in the Circuit Court before the note in suit was executed, for the sum of \$364. Vanover arranged with Worthen to pay said judgment, and he would secure him by the assignment of the Ehrler note, when given. Jane Worthen, the appellee, was a lady of means, obtained from an estate, and her husband, Simon Worthen, arranged to borrow the money of her, agreeing to give this note in suit to her as collateral security for such loan. The appellee made the loan to her husband, who paid the Vanover judgment, and about the first of September, 1891, in a few days after the Ehrler note was made, she received the note in suit assigned by Vanover.

Simon Worthen made the arrangements, as agent of his wife, for obtaining the Ehrler note from Vanover.

Before taking the note, he read the lease and knew of its terms and conditions. Being the agent of his wife in the transaction, the knowledge he acquired thereby was, in law, the knowledge of appellee. She took the note with notice of the terms and stipulations in the lease.

Conceding that the appellant's construction of the terms

of the lease is correct, the effect of that notice was, that, if thereafter, during the first year, the water overflowed the land rented, and injured the crops thereon, the rent should be reduced according to the amount of the damage done.

Conceding further, that the evidence shows the crops were greatly injured by the overflow in May, 1892, and that the appellant probably sustained damage to the extent, at least, of the amount of the note, the real question is, do these facts constitute a defense to this note?

The defense set up in the special plea is, that appellee took the note, with notice that the consideration *had* wholly failed.

The evidence shows, indisputably, that the consideration of the note, at the time it was assigned to appellee, *had not* failed. At that time the consideration of the note was intact, and prescient knowledge alone could have foretold the coming of the flood in May, 1892.

The appellee became the assignee of the note about September 1, 1891, and took it free from the contingent event of a flood occurring thereafter to the injury of appellant's crops, although she knew, before the assignment, of the provisions of the lease in regard thereto.

The note is a negotiable instrument executed by the appellant for a good consideration. No contingent event that might thereafter happen could affect its negotiability. To so hold would be to destroy very largely the value and use of notes as negotiable instruments.

It is set up in the plea that the note was concurrent with, and part of the contract of lease, and its only consideration was the rent to accrue from the farm for the year of said lease, ending August 27, 1892.

With every note there is a concurrent contract of some nature, the consideration of which is an agreement between two or more persons to do, or not to do, some particular thing, either at the time of the execution of the note or thereafter; as that A will loan B money, if B will give A his note according to terms agreed upon. If A pays over the

money at the time B gives his note, the concurrent contract is executed. If he fails to do so, and yet obtains B's note, the concurrent contract has matured, and an assignee taking such note, with notice before purchase of A's failure to comply with his part of the contract, would take the note subject to such defense, as the consideration for the execution of the note had at that time failed. If, however, B gave his note to A in consideration of a concurrent agreement that A was thereafter to permit B to check on such amount when desired, and such note should be sold and assigned to C before notice of any default in such concurrent agreement, but with notice of the original agreement itself, C would take the note free of the contingent event of a breach of such contract.

The concurrent contract is bilateral, and therefore subject to any defense that might arise before its complete execution. The note is a unilateral contract, an unconditional promise to pay a certain sum of money which, under the law, before its maturity in the hands of an assignee, without notice before purchase of a breach of the bilateral contract, is unaffected by the terms thereof.

The contract set up in the plea was itself a part of the consideration of the note, assuming that it properly interprets the contract.

There had been no breach of that contract at the time appellee purchased the note, and the law did not require her to assume that there would be. The appellant retains that consideration. As between the original parties, assuming the appellant's interpretation of the contract is correct, the note was, in May, 1892, by the damage done by the flood, satisfied, as fully as if paid by the maker; yet no one would contend that even if, under the terms of the lease and the note, the right existed, or was reserved, to pay the note in May, 1892, and it was, in fact, then paid to the payee and he had before assigned the same, that such payment could be pleaded as a defense. The counsel for appellant cites the following authorities in favor of his position that the failure of consideration was available to the appellant:

Sec. 9, Chap. 98, R. S.; Bryant v. Sears, 16 Ill. 288; Hamill v. Mason, 51 Ill. 488; Packwood v. Gridley, 39 Ill. 388; Jay v. Reed, 56 Ill. 130; Henneberry v. Morse, 56 Ill. 394. The section of the statute referred to is not applicable to a defense affecting the consideration of a note in the hands of a *bona fide* assignee before maturity. Hopkins v. Withrow, 42 Ill. App. 584. The cases of Hamill v. Mason, 51 Ill. 488, and Jay v. Reed, 56 Ill. 130, hold that where an assignee has notice before purchase that usurious interest is reserved, he will take the note subject to that defense. To the extent of the usury and the penalty the law attaches thereto, the consideration of the notes had failed at the time of the assignment, and, of course, the assignee having notice, would take the notes subject to such defense. In the case of Bryant v. Sears, 16 Ill. 288, the defendants had pleaded a failure of consideration of the notes sued on, "of which the said plaintiff—the assignee—had notice, *at and before the assignment* thereof to them, the said plaintiffs." The plea setting up that defense was held bad in the court below on demurrer, which holding was reversed in the Supreme Court.

The court say at page 290: "This consideration for which the note was thus given, is shown to have failed, of which the plaintiff had notice at the time of the assignment to them."

This decision is in entire accord with our views. In the case of Packwood v. Gridley, 39 Ill. 388, it will be observed at page 390, that Gridley, the assignee of the notes, "stood in the shoes" of the payee. Weed had given Packwood a bond for a deed to certain lands, and had taken Packwood's note therefor, which he assigned to Gridley, at which time Weed also conveyed the same land to Gridley, "with a clause in the deed, that it was made subject to the Packwood bond, said Gridley agreeing to comply with the terms of said bond." In view of these facts it was held that Packwood had a right to set off the amount of money paid by him to redeem from the foreclosure of the Fell mortgage, as against Gridley, the assignee of his notes, which, under the condi-

tions of the bond, Weed should have paid. This holding was but carrying out the contract which Gridley had voluntarily assumed.

The case of *Henneberry v. Morse*, 56 Ill. 394, does not support appellant's contention. The facts in that case show that John M. Morse and Sarah Morse had executed their promissory note to one Lynch, which note contained this clause: "This note is given for part of the purchase price of the property on lot 2, in block 15, in the original plat of the city of Galesburg, Knox County, Ill., lately occupied by A. Thorsalle." This note was, by Lynch, assigned to Henneberry, who brought suit upon it.

The court say: "While the clause in the note fully notified the assignee or purchaser of the true consideration, it was not of itself sufficient to advise him that there was, or would necessarily be, a failure of consideration; but it was evidence in connection with other evidence to be considered by the jury on the question of notice." At page 396, the court further say: "The jury by their verdict have found that the appellant had notice, before he took the note, of the defense that existed against it, and we can not undertake to say that they found incorrectly."

This case is in entire harmony with the views entertained by this court. See also *Siegel v. Chicago Trust and Savings Bank*, 33 Ill. App. 225. It is true this case was not tried below, and has not been presented here by appellee's counsel, as resting on the principle of law, which we consider decisive. The court instructed the jury on the theory of appellant, that notice to the plaintiff of the terms of the contract was sufficient to enable defendant to interpose any defense that he could have done had the suit been brought by Vanover. The court also submitted to the jury the question of the proper interpretation of the contract, which was error.

Quite serious complaint is made against the court below, in the brief of appellant's counsel, for not, as claimed, giving appellant a fair trial. We have examined the record with care, to observe the rulings of the court on the evidence,

and feel assured that, while the court differed from counsel on some questions that arose, yet it is evident the court was entirely impartial and eminently fair. The court was entirely right in not permitting appellant to introduce evidence of the admissions and declarations of the husband in regard to the transaction of obtaining said note, before proof of his agency, or offer of such proof, or that such evidence would be followed up with such proof, especially when some of such declarations proposed to be proven were made at a time when the agent was not engaged in the transaction of his principal's business. *Mullauphy Savings Bank v. Schott*, 135 Ill. 655. It is not the law that the declarations of an agent made at a time when not engaged in the transaction of the principal's business involved in the suit, are admissible as original evidence against the principal. The act and the declaration must unite in order to make such declarations original evidence. *Montgomery v. Brush*, 121 Ill. 513; *Isaacs v. The People*, 118 Ill. 538.

Although the note was taken as collateral security by the appellee, to the extent of the amount secured, the rule above announced applies. *Gannon v. Huse*, 9 Ill. App. 557. As to the residue of the note, any defense can be interposed as to the assignee, that could be, between the original parties. *Saylor v. Daniels*, 37 Ill. 331.

The judgment for appellee in this case was for less than the amount loaned by appellee, with the accrued interest, the *Harrison Machine Works* judgment being for \$364, while the judgment in this case was for only \$365. Although there are errors in this record, yet as no other judgment, under the evidence, could have been properly rendered, the judgment is affirmed.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1892.

MATHER ELECTRIC COMPANY

V.

H. A. MATTHEWS.

Agency—Recovery of Compensation—Appeal and Error—Evidence—Instructions.

1. A general objection to an instruction is not enough. The specific error complained of must be pointed out.

2. In an action brought to recover upon a contract wherein plaintiff was empowered to act as defendant's agent, compensation to be figured on a certain basis, compensation as to special "sales" and "deals" to be settled mutually on each particular "job," this court holds that the contract referred to herein, was such special "sale" or "deal," and declines to interfere with the judgment for the plaintiff.

3. In the case presented, this court holds as proper the granting of leave to plaintiff, after the evidence was closed, and while the cause was being argued to the jury, to file an amended count to the declaration *instantly*, to meet the evidence introduced touching a later agreement, no claim of hardship or surprise having been made by the defendant; and likewise that no special count was necessary; the contract being at an end and nothing remaining but to pay money; *indebitatus assumpsit* was sufficient.

[Opinion filed January 7, 1893.]

APPEAL from the Superior Court of Cook County; the
Hon. GEORGE H. KETTELLE, Judge, presiding.

(557)

Mr. GEORGE BERRY, for appellant.

Mr. W. S. JOHNSON, for appellee.

MR. JUSTICE SHEPARD. In this action, besides the common counts in assumpsit, there was filed a special count which set out the following contract :

“CHICAGO, May 1st, 1890.

H. A. MATHEWS, Chicago, Illinois.

Dear Sir: This company agrees to allow you to act as their agent on the basis of all you can make above the attached price list, less forty per cent discount for dynamos, rheostats and bases, and thirty-five per cent discount on appliances; and to allow you to draw \$75 per month on account. Should your business not prove profitable or satisfactory on this basis, the \$75 per month you draw shall be considered as a salary and compensation of sales. On all special sales or special deals, where prices may be cut below the above discount, it is to be done by approval of ourselves, and the compensation to be settled mutually by yourself and this company on each particular job.

Yours very respectfully,

THE MATHER ELECTRIC COMPANY,

J. H. Reid, Manager.”

And averred that the plaintiff (appellee) made a special sale, or special deal, for the defendant (appellant), of an electric plant to Webster City, Iowa, for the sum of \$13,550, which sale was ratified and performed by the defendant, whereby the defendant became indebted to the plaintiff for a reasonable compensation in making said sale.

On the trial, evidence was introduced tending to show a later agreement on the part of appellant to pay appellee, as compensation for making said sale, a sum not less than ten per cent of the amount of the sale, and after the evidence was closed, and while the cause was being argued to the jury, leave was given to the plaintiff to file an amended count to the declaration *instanter*, to meet the evidence in regard to that later agreement.

Mather Electric Co. v. Matthews.

The evidence clearly established that the contract for the sale of the electric plant to Webster City was the result of appellee's negotiations and exertions; that the bid for the work was made out and the price fixed by the appellant company; that appellee did nothing in the matter of the sale or execution of the contract that was not fully authorized by the appellant.

The main controversy was as to the extent of compensation, if any, owing to appellee.

It would not be useful to recapitulate the evidence. It is sufficient to say that it clearly justified the contention of appellee, that the transaction with Webster City came within the meaning of a "special sale, or special deal," contemplated in the closing paragraph of the written agreement between appellant and appellee, above set forth.

Under a contract such as was entered into between the appellant and Webster City, to put up and equip an entire electric lighting plant in complete running order, for a lump sum, the appellee could not, in the nature of things, know anything about the price at which the company figured the numberless articles included in its price list, and, indeed, it may be said to satisfactorily appear that in the making of the contract to erect the plant, the appellant adopted figures or prices below those at which appellee was authorized by his agreement with the company to make sales of anything. The contract, too, as already stated, was one of special agreement between appellant and Webster City. It was not one that was made with a view to the price list which was the guide of appellee. It was entirely independent of price list figures, and was for an entire job done not only with the "approval" of the appellant, but the written contract itself was executed by the appellant, by its general manager, and by the mayor and city clerk. The conclusion that it was a "special sale or special deal," within the meaning of the agreement between appellant and appellee can scarcely be doubted.

As to the extent of compensation to which appellee was entitled, we can scarcely entertain a question.

Mr. Reid, the general manager of the appellant company, testified that he told appellee he should receive a reasonable compensation, and that "his commission would not be less than ten per cent," in a conversation they had together upon the subject of his compensation for having obtained the contract. And the authority of Reid to make such an agreement does not appear to be questioned.

Some advances were made to appellee, but it is not material to inquire specifically about them. It is plain that the jury, in fixing the amount of their verdict, took the subject into consideration, and made such deductions as, from the evidence, they determined was just.

We do not think there was any error committed in allowing plaintiff to file the amended count.

The count merely conformed to the evidence already introduced by both sides. No claim of hardship or surprise to the appellant was made below, so far as the record discloses, and furthermore, no special count was necessary. The contract between appellant and appellee being at an end, and nothing remaining but to pay money, *indebitatus assumpsit* was sufficient. *Geary v. Bangs*, 37 Ill. App. 301; *Zjednoczenie v. Sadecki*, 41 Ill. App. 329.

If there is any error in the instructions, we do not observe wherein, and appellant does not specifically point out the existence of any.

A general objection to an instruction is not enough. The specific error complained of must be pointed out. *Ludwig v. Huck Malting Company*, 45 Ill. App. 651, and cases there cited.

We see no error in the cause warranting a reversal, and the judgment of the Superior Court will therefore be affirmed.

Judgment affirmed.

MERCHANTS DISPATCH TRANSPORTATION COMPANY
v.
FREDERICK FURTHMANN.

47	561
149	66
47	561
108	206

Carriers—Spoiling of Goods in Transit—Recovery for.

1. The nature and interpretation of a contract of shipment must be governed by the law of the State in which it was made.

2. A receipt delivered to the truckman of a shipper by the carrier upon the receipt of goods, containing conditions touching the conveyance thereof, if the only written evidence of the contract of shipment, is binding on the consignee, although the shipper was ignorant of its terms.

3. The receipt can not be considered as expressing the contract of the parties, where the same was surrendered and a bill of lading issued in its stead.

4. A failure to object to limitations contained in a bill of lading delivered several days after certain goods had been shipped can not, in view of the trend of decisions in the State of New York, be held to be a waiver of an oral contract of shipment wherein different terms were agreed upon.

5. Parol evidence is admissible to vary the terms of a written contract, where an oral agreement exists as to any matter on which the document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.

[Opinion filed January 7, 1893.]

APPEAL from the Superior Court of Cook County; the
HON. GEORGE H. KETTELLE, Judge, presiding.

This was an action brought to recover the value of beer shipped from New York City, by way of appellant's line, to appellee in Chicago.

In consequence of the warm weather, the beer fermented on the way and was spoiled when it arrived here. Upon the trial below, Rudolph Oelsener testified: "On May 4, 1889, I shipped twenty-half barrels of beer to plaintiff. On the morning of May 4th, before shipping the beer, I had a

conversation with reference to the manner of its shipment, at the office of the Merchants Dispatch Transportation Company, with one of the men in charge, whom I had been in the habit of having conversations with in previous shipments. I told him we had fifty half barrels of beer to go to Chicago; if they could ship them so that there was no risk we would do so, otherwise I would rather wait till Tuesday; that is one of their regular shipping days for cold service. Their shipping days for cold service were Tuesdays and Fridays. In shipping beer to Chicago that time of the year I was in the habit of shipping by their Tuesday and Friday service.

The agent told me that he would take care of it—being about half a car—as well as if we were shipping that beer Friday, or if we would have waited until Tuesday. He told me that they had not even iced the oyster car yet, and they would ship the beer just the same as if it was shipped on a Tuesday or a Friday, otherwise I would not have shipped the goods. If the agent had not told me that he would ship these goods—although it was Saturday—in the same manner that he would ship them on Tuesday or Friday—in cold service—I would not have shipped this beer.

I sent this beer to defendant's freight station by one of our trucks after this conversation."

The beer reached Chicago about 4 p. m. on May 9th, and was unloaded the following morning about 8 o'clock; it was shipped in an ordinary common box car, not a refrigerator or an iced car. Oelsener did not order the beer shipped in an iced car or a refrigerator car.

Defendant's witnesses testified that whenever beer is shipped in an iced car, it is the custom for the shipper to make arrangements at the defendant's office, and that the ice is charged for. The conversation testified to by Oelsener was denied by defendant's witnesses.

Upon the trial appellant offered to show that when Mr. Oelsener's truckman took this beer to appellant's freight station, there was given to and received by him, without objection, a receipt, specifying, among other things, that the

company would not be liable for injury to any articles of freight, occasioned by the weather or natural tendency to decay; this the court refused to allow, but did permit the defendant to show a bill of lading for the beer, issued by the defendant to Mr. Oelsener, and received by him without objection. The evidence tended to show that the bill of lading was received by Oelsener May 6th, after the goods had left New York. The bill of lading contained clauses of exemption from liability substantially like those in the receipt.

The defendant's general freight agent at New York City testified that in the ordinary course of business the receipt would be presented at his office by the shipper, who would receive, upon its surrender, a bill of lading; and that the receipt was surrendered at his office by the shipper, and the bill of lading then issued.

Messrs. W. H. & J. H. MOORE & PURCELL, for appellant.

Messrs. EDMUND FURTHMANN and WILLIAM M. JOHNSON, for appellee.

MR. JUSTICE WATERMAN. The contract of shipment having been made in New York, is to be governed, as to its nature and interpretation, by the law of that State. Mich. Cent. R. R. Co. v. Boyd, 91 Ill. 268.

Proceeding upon this principle, appellant claims that the evidence introduced by it upon the trial of this cause, shows that the law of that State is that when a receipt, such as was offered in this case, is received without objection, it becomes the contract of the parties; that all prior oral negotiations are merged therein, and that it is not necessary for the carrier, in order to avail himself of the exemptions contained therein, to show that the shipper had knowledge thereof or assented thereto.

We are disposed to agree with counsel for appellant in this contention, and if the receipt had remained the only written evidence of the contract of shipment, we should be

disposed to hold appellee bound by its conditions, although the shipper was ignorant of its terms.

The undisputed evidence in this case is, that in accordance with the custom of business, and as Oelsener was a frequent shipper, it must be said the understanding of the parties, the receipt was surrendered and a bill of lading issued in its stead. This having been done, we do not think that the receipt can be considered as expressing the contract of the parties.

Oelsener retained no copy of the receipt he surrendered, and it would be a most violent presumption to hold that after, in accordance with the custom of business, he surrendered it and took a bill of lading in its stead, it still continued to be the written expression of the contract between the parties. The acts of the parties unmistakably show that nothing of the kind was understood by either. Had the receipt been a plain, unconditional agreement to carry the goods to Chicago, and had Oelsener, before the goods had been taken out of the station house, surrendered this and taken the bill of lading given to him, we can not believe that appellant would have contended that the receipt constituted the contract of shipment.

The fact that the receipt and the bill of lading contain substantially the same limitations of liability on the part of the carrier, does not tend to show that the receipt remained the contract between the parties. Other circumstances and conduct show that the appellant never expected that the receipt was to be the contract of shipment, but that it, in accordance with the custom of business, tendered the bill of lading as a statement of the contract it wished to be bound by. Where it is the custom and understanding that the receipt given upon the arrival of goods at a freight house is to be surrendered, and a bill of lading issued in its stead, and such course is pursued, we do not think that, under the law of the State of New York, the receipt is treated as amounting to a contract of shipment, but rather as a mere acknowledgment of a receipt of goods for shipment upon terms implied, or theretofore or thereafter to be agreed upon.

Merchants Dispatch Trans. Co. v. Furthmann.

In the present case, the verdict of the jury must be taken as establishing that prior to the reception of the goods the carrier agreed with the shipper to transport them in "cold service," and before any bill of lading was made, had shipped the goods. The case therefore comes within the rule announced in *Bortwick v. The Baltimore and Ohio R. R. Co.*, 45 N. Y. 712, and *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206.

In the first mentioned case an oral agreement had been made to carry by "all rail." After this the goods were delivered at the depot, and depot receipts taken; the goods were then shipped by the carrier; two days subsequent to this, bills of lading were sent to and received by the owner. The goods were lost while being transported by steam from Baltimore to New York. The Court of Appeal in that case said:

"The goods were shipped under this verbal agreement, before any written contract or bill of lading had been tendered to the plaintiff. The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods. The rule that prior negotiations are merged in a written contract, does not apply to such a case as this."

In the case of *Swift v. Pacific Mail Steamship Co.*, *supra*, a verbal contract of shipment was made in New York. After the goods had been shipped, bills of lading variant from the verbal arrangement were given. It was held that the carrier could not, after the carriage had been entered upon, alter the verbal agreement by sending bills of lading, although it was the expectation when the goods were delivered that bills of lading would be given.

So in the present case, the failure to object to limitations contained in bills of lading delivered two days after the goods had been shipped can not, under the New York rule, be held to be a waiver of the oral contract of shipment, because to then object would have been useless. As is said in *Swift v. Pacific Steamship Co.*, *supra*, "It was doubtless expected that bills of lading would be executed, but it could not have been expected that by them the contract so made should be in any way modified."

The agreement made with Oelsener is not necessarily inconsistent with anything contained in either the receipt or the bill of lading. The agreement with him was to ship "in cold service;" he might have been quite willing, if this were done, to absolve the company from liability for loss occasioned by the state of the weather. The agreement with him was upon a subject not mentioned in either of the written documents.

Stephen, in his Digest of the Law of Evidence, Art. 90, mentions as one of the exceptions to the rule concerning the inadmissibility of parol evidence to vary the terms of a written contract, and as to what under the rule is admissible—"The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them." See also Greenleaf on Ev., Vol. 1, Sec. 284a, and Sec. 286; and *Welz v. Rhodius*, 87 Ind. 1.

This aspect of the case, not having been discussed by counsel, we express no opinion upon.

The instructions given fairly presented the law of the case, and we find no error requiring a reversal of the judgment of the court below; it is therefore affirmed.

Judgment affirmed.

MR. JUSTICE GARY. I think under the New York law as proved, the receipt given when the goods were delivered, is the whole contract of the parties.

Hughes v. Fort Dearborn Nat. Bk.

ANDREW F. HUGHES, FOR USE, ETC.,

V.

FORT DEARBORN NATIONAL BANK.

47	567
54	523

Garnishment.

Garnishment proceedings will not lie in the Circuit Court upon a judgment of a justice of the peace.

[Opinion filed January 7, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding.

Messrs. H. C. BENNETT and W. A. PHELPS, for appellant.

Mr. THOMAS J. WALSH, for appellee.

MR. JUSTICE GARY. The Joliet & Chicago Stone Company obtained a judgment against Hughes before a justice of the peace, on which an execution was issued and returned "no property found." Thereupon the stone company commenced garnishment proceedings upon that judgment in the Circuit Court.

The only question in the case is whether garnishment proceedings will lie in the Circuit Court upon a judgment of a justice of the peace. As such proceedings are purely statutory the answer depends upon what is the antecedent of the word "such" in the several places where it occurs in the first section of the Garnishment Act, as follows: "Whenever a judgment shall be rendered by any court of record or any justice of the peace, * * * and on the affidavit of the plaintiff, or other credible person, being filed with the clerk of such court or justice of the peace, * * * it shall be lawful for such clerk or justice of the peace to issue summons," etc.

It must have some antecedent, and we read the statute as having the same meaning as if the word "such" had been repeated after "or" in the last two places where "or" occurs.

The precise question has never been before the Supreme Court or any of the Appellate Courts of the State, so far as we are advised, but it was in effect involved in Toledo W. & W. Ry. v. Reynolds, 72 Ill. 487, Nesbitt v. Dickover, 22 Ill. App. 140, and Home Ins. Co. v. Kirk, 23 Ill. App. 19, and the construction given which we adopt.

The fact that we feel ourselves bound by a prior decision of this court, in conflict upon another point (Merchant v. Howland, 46 Ill. App. 458) with the decisions cited from the second district, does not prevent us from entertaining a high respect for the opinions of that court, which are in accord with our own.

On motion of the appellee, the Circuit Court rightly quashed the garnishee summons and dismissed the suit.

Judgment affirmed.

47 568
147s 634

JOHN B. GROMMES AND MICHAEL ULRICH

V.

ST. PAUL TRUST COMPANY ET AL.

Landlord and Tenant—Guarantee of Payment of Rent by Third Party.

1. Provisions in leases that upon a re-entry for breach of covenants, the landlord may re-let the premises for the account of the lessee, holding him for any deficiency, have uniformly been upheld.

2. An eviction is not a bar to rent that had previously accrued.

3. A clause providing that a re-entry may be made without the same "working a forfeiture of the rents to be paid" refers to rents to be paid after the re-entry.

4. Where a lease contains a clause prohibiting sub-letting, in case it takes place, receipt of rent by the landlord from the sub-tenant does not release the tenant from his promise to pay, should the former fail to do so, but such receipt amounts to a waiver of such condition.

Grommes v. St. Paul Trust Co.

5. In an action against the guarantors upon a lease of the payment of rent provided for therein, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed January 7, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

The facts presented by this record are that on or about the first of October, 1888, General Sibley, of St. Paul, Minnesota, leased to one H. C. Donnelly, certain premises in that city until the 31st day of December, 1889, at a rental of \$200 per month, payable monthly in advance. The lease contained the usual provisions prohibiting an assignment of the lease, or any sub-letting of the premises, without consent of the landlord, and required them to be kept in good condition and repair; and contained a covenant that the lessee at the expiration of the term would quietly surrender up possession of the premises. The lease contained this further provision:

“It is further agreed by and between the parties hereto, that should said party of the second part, his heirs, executors, administrators or assigns, fail to make the above mentioned payments, as herein specified, or to pay any of the rent aforesaid, when due, or shall fail to fulfil any of the covenants herein contained, then, and in that case, it shall be lawful for the said party of the first part, his heirs, executors, administrators or assigns, to re-enter and take full and absolute possession of the above rented premises, and hold and enjoy the same fully and absolutely without such re-entry working a forfeiture of the rents to be paid, and the covenants to be performed by the said party of the second part, his heirs, executors, administrators or assigns, or any of the same, during the full term of this lease.”

The lease also provided that the lessee, on paying the rent and performing the covenants specified, should have peaceable possession of the premises during the devised term.

At the time the lease was made, and as part of the transaction and before delivery, the appellants executed the following contract of guaranty, indorsed thereon :

“State of Minnesota, Ramsey County. We, John B. Grommes and Michael Ulrich, co-partners, doing business at Chicago, Illinois, under the firm name of Grommes & Ulrich, in consideration of the execution and delivery of the foregoing lease from Henry H. Sibley to H. C. Donnelly, and of the sum of one dollar to us in hand paid by said Henry H. Sibley, the receipt whereby is hereby acknowledged, do hereby covenant, guarantee and agree that the said H. C. Donnelly shall well and truly pay all rents and perform all other covenants and conditions to be by him paid, kept and performed, according to the terms and conditions of said lease, for and during the entire term thereof.

Witness our hands and seals, at St. Paul, this 4th day of October, 1888.

JOHN B. GROMMES, [SEAL.]
MICHAEL ULRICH,
Partners as Grommes & Ulrich.

In the presence of
HYLER H. HORTON,
WM. H. KINKAID.”

Possession of the premises was immediately taken by the lessee. January 4, 1889, Donnelly, the lessee, sold out to one D. P. Ruse, who took possession and paid rent to Sibley up to June 1st of that year. About the 20th of June, the lease was placed by General Sibley in the hands of Harvey Officer, his attorney, who made demand for the rent for the month of June, 1889, which was not paid. On the 1st of July following, he again made demand for the rent for the months of June and July, which was not paid. On the 23d of June, 1889, a formal demand was made for possession of the premises.

On the 2d of July, 1889, General Sibley commenced a suit of forcible entry and detainer in the Municipal Court of St. Paul, Minnesota, which had jurisdiction of such cases,

Grommes v. St. Paul Trust Co.

against H. C. Donnelly, the lessee, and one D. P. Ruse, in which such proceedings were had that a judgment was rendered on the 16th day of July, 1889, for restitution to the plaintiff of the premises described in the lease, for failure to pay rent for the months of June and July of that year. A writ of restitution was issued to the sheriff of Ramsey County, which was returned executed, and the keys of the premises delivered to General Sibley's agent on the 17th of July, 1889. The appellants were notified of the failure to pay rent for the months of June and July on the 3d day of July, 1890, and referred the matter to their attorney by a letter dated July 5th. On the 9th of July, 1889, Horton, the attorney of appellants, was notified that the lessee was in default, and suit for possession pending, and shortly after the recovery of possession of the premises, General Sibley's attorney called on the attorney of the appellants, and tendered him the keys of the premises, which he refused to receive, and he was shortly afterward notified that General Sibley would make due effort to rent the premises himself, so as to reduce the loss under the lease as much as possible. The premises were advertised for rent by General Sibley's attorney, but remained vacant and unoccupied during all the remaining period of the term.

This action was brought upon the contract of guaranty indorsed upon the lease, to recover the rent which accrued under it, from the 1st day of June to the 31st day of December, 1889. A verdict was returned in favor of the appellees for the face of the stipulated rent for the time mentioned, and a judgment entered thereon, from which an appeal has been prosecuted to this court.

MESSRS. HYLER H. HORTON and WINSTON & MEAGHER, for appellants.

MESSRS. OTIS & GRAVES, for appellees.

MR. JUSTICE WATERMAN. It is not claimed that, without the special provision of the lease under consideration, there

would have been any liability, either of the lessee or of appellants, his guarantors, for the payment of rent accruing after the judgment of restitution.

Provisions in leases that upon a re-entry for breach of covenants, the landlord may relet the premises for the account of the lessee, holding him for any deficiency, are not uncommon, and have, so far as we are aware, uniformly been upheld. *Hall v. Gould*, 13 N. Y. 127; *Morgan v. Smith*, 70 N. Y. 537.

The principal question in this case is, as to the continuance of the liability of the lessee for rent, the landlord not having proceeded without process to re-enter, but having in a court of competent jurisdiction obtained a judgment of restitution under which he took possession.

It is conceded that, a forfeiture of the conditions of the lease having taken place, the landlord might, under the conditions of the lease, have re-entered without process. The fact that instead of doing without process what he might, he commenced suit to have his right established, and under a judgment of court re-entered, we do not think material. The lessee had gone out. Apparently all parties, Donnelly, Ruse and appellants, were quite willing that Sibley should re-enter. We do not see that by the caution of the landlord in declining to take possession until he had obtained a judgment of restitution, appellants or the lessee were injuriously affected or can have any exemption from their liability under the terms of the lease and guaranty. The course pursued by General Sibley was very similar to that taken by the landlord in *Hall v. Gould supra*.

The lease provides that a re-entry may be made without the same "working a forfeiture of the rents to be paid." We think this must refer to the rents to be paid after the re-entry. An eviction is not a bar to rent that had previously accrued. *Wood on Landlord & Tenant*, 1st Ed., page 780; *Leadbeater v. Roth*, 25 Ill. 478; *Wright v. Lattin*, 38 Ill. 293; *Pepper v. Rowley*, 73 Ill. 262.

The provision can not be given any significance without

holding that it applies to rents that may accrue after a re-entry. Such being the terms of the contract, appellants became, by their guaranty, guarantors of the payment of rent after as well as before a lawful re-entry.

It is urged that the judgment of restitution put to an end the estate of the lessee, and therefore no rent of the premises could thereafter accrue. So also, when under a lease permitting re-entry for breach of covenants, the lessor, upon covenant broken, re-enters, and in pursuance of provisions permitting him to relet for account of the lessee, does re-let them to a third party, the estate of the lessee is at end, for it is manifest that the same estate can not be in two separate and several lessees; yet the deficiency thus arising may be collected by the lessor.

It is immaterial whether the sum which, in the present case, appellee has recovered from appellant be rent, according to the strict legal definition of that word. The contracting parties, Sibley and Donnelly, provided that a re-entry for a forfeiture should not work a forfeiture of what they were pleased to call "the rents to be paid." If what they meant is clear, it is of no consequence that a lawyer might not, in endeavoring to be technically accurate, speak of sums to be paid for a period in which the lessee had no estate as rent.

We do not find that the testimony of General Sibley was introduced in evidence.

Appellants might have had the jury instructed that the affidavit of General Sibley, contained in the record of the suit for restitution, and all reference to matters contained in such affidavit, whether in the writ issued or the opinion given in said suit, were to be disregarded in the present action; but if all that appellants desired to show by Donnelly had been admitted, we do not think it would have been material.

The reception of rent by Sibley from Ruse was undoubtedly a waiver of the condition in the lease against sub-letting, but it did not release Donnelly from his obligation to pay; while of course, from his promise to pay rent which Ruse actually paid, Donnelly was relieved.

The lease being produced, it was itself *prima facie* evidence that the rent for the expired term had not been paid; that is, the burden was thus thrown upon appellants to show payment. Aside from this, there was a good deal of evidence of a failure to pay. The agent of the landlord testified that he repeatedly demanded payment; there was no pretense that any claim had ever been set up that any rent subsequent to June 1, 1889, had been paid, and Ruse testifies that the month of May, 1889, was the last payment he made.

The jury were fairly instructed, and we find no error requiring a reversal of the judgment of the Circuit Court; it is therefore affirmed.

Judgment affirmed.

ROBERT B. CROUCH

V.

FIRST NATIONAL BANK OF CHICAGO.

Limited Partnerships--Secs. 7 and 8, Chap. 84, R. S.

1. The affidavit in question being defective in view of Sec. 7, Chap. 84, R. S., this court holds that a limited partnership was not formed in the case presented.

2. Owing to particular circumstances and hardships, courts sometimes refuse to dismiss appeals from judgments which do not completely dispose of the cases in which they were entered.

[Opinion filed January 25, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. WILLIAM J. MANNING, for appellant.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellee.

47 574
58 387

47 574
156s 342
156s 352

47 574
62 354

47 574
166s 456

47 574
73 118

47 574
d107 254

MR. JUSTICE GARY. The appellee was but one of the many parties defendant to a bill filed in the Circuit Court by the appellant.

Some, at least, of the other defendants were necessary parties to the suit, though practically, if the appellant ever obtains any relief, it must come from the strong boxes of the appellee. The appellee successfully demurred to the bill, and the court dismissed it as to the appellee only.

Authority requires us, on the motion appellee has made, to dismiss this appeal, as the suit is still pending below against the other defendants. The cases are collected in *Parker v. Roberts*, 44 Ill. App. 232.

But it would be a great hardship upon, if not a denial of justice to the appellant, to dismiss this appeal, if he is entitled to relief upon the merits. No decree against any of the other defendants, which he can have, would be of value to him. He can not dismiss them out of the case, and continue his suit against the appellee.

We will act upon the considerations that moved the Appellate Court of the Fourth District, in *Peoria D. & E. Ry. Co. v. Pixley*, 15 Ill. App. 283, and refuse to dismiss the appeal.

The point upon which the demurrer was sustained is, that a partnership, intended to be limited under the statute, is not in fact a limited partnership, because of defects in the affidavit.

The statute, Sec. 7, Chap. 84, calls for an affidavit "stating that the amount of money, or other property at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually and in good faith contributed and applied to the same." The affidavit here was "that the amount of \$50,000, stated in the certificate of said partnership to have been contributed to the capital stock thereof by the said special partners, has been actually contributed, and applied, and paid into the same."

How? The statute requires that to appear; whether "in money or in other property at cash value," "in good

faith," or to be withdrawn as soon as a temporary purpose is served?

Sec. 8 is imperative that until such affidavit as Sec. 7 requires is filed, "no such partnership shall be deemed to have been formed." The statute requires an explicit statement in the affidavit, if not in the words of the statute, then in some words which, with their context, mean what the statutory words mean with their context.

We do not regard it as part of our duty to go over the cases cited by the appellant from the reports of other States in which judicial interpretation has repealed legislation.

The turning point is whether, under such an affidavit, a limited partnership was formed.

We hold the negative, and as this is decisive of the case, the decree is affirmed.

Decree affirmed.

THE C. & C. ELECTRIC MOTOR COMPANY

V.

ALEXANDER H. LEWIS.

Appeal and Error—Account.

1. An appeal does not lie from a mere order of reference to a master to take testimony, state an account and report the same to the court; such order is not a final decree from which an appeal lies.

2. At law, in an action of account, the order to account is, as in chancery, merely interlocutory, and is not appealable.

[Opinion filed January 25, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. CHESTER M. DAWES and GEORGE W. BROWN, for appellant.

Wright v. Griffey.

Mr. O. M. SMITH, for appellee.

MR. JUSTICE WATERMAN. Appellant filed its bill in the court below, asking that appellee be directed to come to an accounting with it in respect to the matters and things set forth in said bill.

A general demurrer by appellee was overruled, and the cause referred to a master to take the testimony that might be offered therein, and to state an account between the parties and report the same, together with his findings of the law and the facts.

Whereupon appellant prayed an appeal to this court, which was allowed.

An appeal does not lie from a mere order of reference to a master to take testimony, state an account, and report the same to the court; such order is not a final decree from which an appeal lies. *Gage v. Eich*, 56 Ill. 297; *Hunter v. Hunter*, 100 Ill. 519; *Williamson v. Borchsenius*, 26 Ill. App. 64; *Daniell's Ch. Pr.*, 1462, Note 5.

At law, in an action of account, the order to account is, as in chancery, merely interlocutory, and is not appealable. *Anderson v. Lundburg*, 41 Ill. App. 248.

The appeal in this case will therefore be dismissed.

Appeal dismissed.

ALBERT S. WRIGHT
v.
GUSTAVUS W. GRIFFEY.

47	577
147s	496

Judgments and Decrees—Former Adjudication.

When the ownership of personal property has been decided at law to be in a given person, even if an appeal therefrom is taken, the judgment is a bar to a proceeding in equity, brought to obtain possession thereof.

[Opinion filed January 25, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. B. R. BURROUGHS, Judge, presiding.

MESSRS. G. W. & J. T. KRETZINGER, for appellant.

MESSRS. RUNNELLS & BERRY, for appellee.

MR. JUSTICE GARY. The appellant filed a bill, the object of which was to get from the appellee 3,100 shares in the stock of a mining company.

The appellee put in as a defense that the appellant had sued the appellee before in an action of assumpsit; that in that suit the ownership of the stock in question was determined in favor of the appellee, stating the circumstances of the law suit, so as to reach that conclusion.

The appellant did not except to the answer, but replied to it, and amended his bill alleging that the judgment in the suit at law was suspended by an appeal still pending in the Supreme Court. Of this appeal there was no evidence.

The course of the pleading confessed that the defense was good if proved, and being, as it was, proved to be true, no question can now be made as to its sufficiency. And even if the allegation of an appeal pending had been proved, the effect of the judgment as a bar would have remained. *Moore v. Williams*, 132 Ill. 589.

The appellant should have continued (if he could) this cause until that appeal was disposed of. Had it terminated in his favor, the bar would have been removed. The decree is affirmed.

Decree affirmed.

WATERMAN, J., dissenting. I do not think that the issue involved in this case was determined in the suit at law.

Farwell v. Great Western Telegraph Co.

CHARLES B. FARWELL ET AL.

V.

GREAT WESTERN TELEGRAPH COMPANY ET AL.

47	579
58	531
47	579
161s	522

Appeal and Error.

1. A decision of this court stands as to a given point, the same not having been disapproved by the Supreme Court upon appeal.
2. This court affirms a decree dismissing a bill brought to undo certain things done in another suit still pending.

[Opinion filed January 25, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Messrs. TENNEY, CHURCH & COFFEEN, for appellants.

Mr. JOHN M. HAMILTON, for Franklin D. Gray, appellee.

Mr. WILLIAM J. AMMEN, for George F. Harding, appellee.

Mr. THOMAS J. SUTHERLAND, for Thomas J. Sutherland, Franklin D. Gray and Adelaide K. Sutherland, appellees.

Messrs. BLACK & FITZGERALD, for the Great Western Telegraph Company, and Frank A. Helmer, its receiver.

Mr. ERIC WINTERS, for Licinia E. Hilton, appellee.

Mr. CHARLES E. POPE, for Selah Reeve, appellee.

MR. JUSTICE GARY. This is a bill, as was the case in *Bates v. Great Western Tel. Company*, 35 Ill. App. 254, 134 Ill. 536, to undo what had been done in another suit, still pending.

Although the Supreme Court went into the merits in that case without passing upon the point on which we decided it, yet they expressed no disapproval of our position. Our decision, therefore, remains law for us unless we have become wiser.

Besides the authorities we there cited, see *Field v. Ridgley*, 116 Ill. 424, and *Shepard v. Speer*, 41 Ill. App. 211, 140 Ill. 238, as to a second suit to obtain relief which may be had, if entitled to it, in the first. And that the court may, in the original suit, do all that it is asked by this to do, see also *Black on Judgments*, Secs. 308, 509-695.

The decree dismissing the bill is affirmed.

Judgment affirmed.

WATERMAN, J., dissents.

SOLOMON T. FISH

V.

R. SEEBERGER.

Agency—Fire Insurance.—Property in Hands of Commission Merchants.

1. This court will not consider an alleged variance between the evidence and the declaration in a given case, the same not having been pointed out on trial.

2. A person who undertakes to act for another, may not, in the same matter, act for himself in any way to the disadvantage of his principal, and the profits and gains made by the agent in the execution of his trust, belong to the principal; it matters not whether such profit or advantage be the result of the performance of the duty intrusted to him, the obedience of orders to him given, or the violation thereof.

3. It does not matter that the conduct of the agent may have been in the particular case perfectly fair in intent, and that he may not have contemplated any injury to his principal, but only to do that which he assumed to be perfectly right and proper; the result is the same.

4. If the agent, dealing legitimately with the subject-matter of his agency, acquires a profit, the principal may claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result.

5. All profits and every advantage beyond lawful compensation made by an agent in the business, or by dealing or speculating with the goods of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal. The law will not permit an agent, without the

Fish v. Seeberger.

assent of his principal, to acquire an interest in the subject-matter of the agency, adverse or in opposition to that of his principal.

6. In an action brought to recover certain insurance money, claimed to have been received by the defendant, a commission merchant, for the loss on certain butter belonging to plaintiff, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

[Opinion filed January 25, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

This was an action of assumpsit, brought by appellee, to recover certain insurance money, claimed by him to have been received by appellant, for loss on certain butter belonging to appellee. It appeared upon the trial that appellant, a commission merchant, had, in the year 1889, a large quantity of butter, belonging to appellee, which had been sent to appellant for sale. This butter had been stored by appellant in a certain warehouse in the city of Chicago, awaiting sale, and while in such warehouse, on November 4, 1889, a fire occurred in "Warehouse A," which was west of and adjoining "Warehouse B," in which the butter was stored, by which fire it was claimed by appellant, in proofs of loss made by him to the insurance companies, the butter was damaged. Prior to this date appellant had taken out policies of fire insurance in the name of S. T. Fish & Co., on merchandise consisting chiefly of salt, butter, eggs, fruit and other country produce, etc., their own, or held in trust by them, or on commission, or on joint account, or sold but not delivered, contained in the seven-story and basement brick building, situated No. 228 and 230 Michigan street, Chicago, Ill., and known as Western Refrigerating Company's "Warehouse B."

Appellant, in his proofs of loss, made claim for damage to 1,375 packages of butter, appraising the same at twenty cents a pound, and agreed with the insurance companies to submit the matter of the loss and damage by said fire to arbitrators. The arbitrators examined the butter and

allowed to appellant damages on 1,375 packages of butter, containing 75,053 pounds, at three and one-fourth cents per pound, amounting to \$2,536.72, with thirty dollars for expense of handling, making, in all, \$2,566.72.

Very shortly after this, appellant sold the butter of appellee for ten and one-half cents a pound, and thereafter, in rendering his account to appellee, made no mention of having received anything for loss or damage to said butter, but did render to appellee an account for insurance premiums by him (appellant) paid. Appellee at first objected to the claim for insurance premiums paid, but afterward yielded to such claim.

When appellee discovered that appellant had received three and one-fourth cents per pound damages for all of the butter appellant had on hand at the time of said fire, he made claim against appellant for the money so by him received, and it not being paid, brought this suit. Upon the trial appellant claimed and asked to be permitted to show that the butter of appellee was not damaged at all by said fire, and that the appraisal and allowance of damage, made by the arbitrators acting for the insurance companies and appellant, was not made upon any separate examination of appellee's butter, or any estimate of loss in particular, but was a general award intended to cover all of the loss that had been sustained upon butter, and also offered to show that the personal loss to him (appellant) by said fire, upon butter by him (appellant) owned, was greater than the entire amount received by him from the insurance companies. The arbitrators were permitted to testify, and their testimony tended to show that they opened and examined the interior of only fifty packages of butter, and their estimate was a general one; that they considered all of it damaged, but their estimate was made upon the butter as an entirety, and not upon that of appellee alone, or upon any particular lot. Otherwise the court refused to permit appellant to introduce evidence offered by him, the court holding that it was immaterial whether the loss sustained by appellant upon the butter that belonged to him, was

Fish v. Seeberger.

greater or less than the total amount of insurance money by him received, and that it was also immaterial whether, as a matter of fact, the butter of appellee was actually damaged, or sold for a greater or less price in consequence of said fire, the opinion of the trial court being that appellant, having of his own motion and without notice to appellee, claimed and received on the total amount of butter held by him (appellant), including that of appellee, damage to the amount of three and one-fourth cents per pound, such money, to the extent of the butter owned by appellee, was a profit made by appellant upon the property of his principal in his hands, and, consequently, for which he must account to appellee. There was and is some contention on the part of appellant that appellee did not make out that he had on hand, in the custody of appellant, 622 packages of butter at the time of said fire. The jury rendered a verdict of \$1,079.49 for appellee, upon which there was judgment.

Messrs. MOSES, PAM & KENNEDY, for appellant.

Mr. GEORGE C. FRY, for appellee.

MR. JUSTICE WATERMAN. Appellant denies that it was the custom of commission merchants in Chicago at this time to insure goods in their charge, although he admits making a charge for insurance, and in one of the letters to appellee stated that where goods are held in storage it is customary to charge insurance. However this may be, the fact appears that appellant did take out certain policies of insurance amounting in the aggregate to the sum of \$15,500, and that the said policies covered by their terms all butter held by appellant, either on his own account or in trust or on commission, and that under this policy appellant made a claim for loss upon all the butter he had in storage, including that of appellee. Such being the case, we think it quite immaterial whether it was the custom of commission merchants to insure goods of their principals, or whether there had ever

been any agreement between appellant and appellee for insurance. Nor do we think it material whether, as a matter of fact, the goods of appellee were actually damaged by the fire, on account of which appellant claimed and received payment of a loss, or whether the loss of appellant at said fire upon his own goods exceeded the total amount of insurance money received by him. The conduct of appellant shows that beyond question he considered this insurance to be in part for the benefit of appellee. He made to him a charge for insurance premiums by him (appellant) paid, and the validity of such charge appellee finally conceded.

When the fire occurred, appellant might at once have notified appellee of it, and asked him to come on and look after his interests in that regard; but without doing this, appellant proceeded to make claim for the loss that had been sustained and to submit the question of the amount of such loss to arbitration. Such arbitration and an award having been made, under such submission appellant received the amount of the loss so found. In all this, appellant assumed to act and represent appellee, and he can not now be heard to complain if appellee insists upon having the benefit of his action. Indeed, it would seem that appellant under such circumstances ought to be quite content if appellee is willing to concede the right of appellant to submit his (appellee's) claim for loss to arbitration, and to receive the amount found by the arbitrators appointed at the instance of appellant, without notice to him (appellee), especially as in the sworn statement made by appellant to the arbitrators, he appraises all of the butter before the loss at twenty cents per pound, and then, having received damages thereon only to the extent of three and one-fourth cents per pound, sold that butter for ten and one-half cents.

Nor do we think it material in this action, if it be the case, that a ppellant's loss upon the butter by him owned was greater than the total amount of insurance money received by him. Appellant, at the time of the fire, might easily have notified appellee to come on and look out for his interests, informing him that he (appellant) would claim all the

insurance money that might be received under the policies, but instead of doing this, he proceeded to act as before stated, without notice to appellee, and has thereby placed appellee in a position where it is now impossible for him to make claim against the insurance companies for the damage done to his (appellee's) goods.

It is urged that there is no equity in the claim of appellee, because it is claimed that in reality, the butter of appellee was not damaged at all. We think that appellant is now estopped to make any such claim. Appellee never had, after the fire, any opportunity to examine his butter, and determine for himself whether or no it had been damaged. That he did not have such opportunity was entirely owing to the action of appellant; and we think the well-established principles of the law governing the relations of principal and agent, forbid that appellant should at this time, and under these circumstances, be now allowed to say that the goods of appellee were not damaged at all.

It may be, that had appellant made a claim to the insurance companies for loss only upon butter by him (appellant) owned, that he would have received thereon as much, or more than he did obtain; but an agent can not be allowed to use, for his own profit only, in any manner, the goods of his principal. It is a well settled principle, that a person who undertakes to act for another, shall not in the same matter act for himself, in any way to the disadvantage of his principal, and that the profits and gains made by the agent in the execution of his trust belong to the principal; and it matters not whether such profit or advantage be the result of the performance of the duty intrusted to him, the obedience of orders to him given, or the violation thereof; whatever profit or advantage the agent makes out of the property of his principal, belongs to the principal. All experience shows that it is only by a rigid adherence to this rule, that temptation can be removed from one acting in a fiduciary capacity, to seek his own advantage to the injury of his principal. Nor does it matter that the conduct of the agent may have been in the particular case per-

fectly fair in intent, and that he may not have contemplated any injury to his principal, but only to do that which he assumed to be perfectly right and proper. The result is the same. If the agent, dealing legitimately with the subject-matter of his agency, acquires a profit, the principal may claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. All profits and every advantage beyond lawful compensation, made by an agent in the business, or by dealing or speculating with the goods of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal. The law will not permit an agent, without the assent of his principal, to acquire an interest in the subject-matter of the agency, adverse, or in opposition to that of his principal. Mechem on Agency, Sec. 469; Cottom v. Holliday, 59 Ill. 179; Dennis v. McCagg, 32 Ill. 429-444; Switzer v. Skiles, 3 Gilm. 529; Dutton v. Willner, 52 N.Y. 312-319; 9th Ed., Story on Agency, Secs. 192-207-208-210-212-214; Ewell's Evans on Agency, Marg. paging, 243; Judevene v. Hardwick, 49 N. E. 180.

It is insisted by the appellant that the butter was not only not injured, but was saved, and that its owner received the full benefit thereof. As before stated, we think this is a claim which appellant can not now be heard to make. Had he given appellee an opportunity he might have been able to show that the damage to his butter was much more than three and one-fourth cents per pound; that it in reality was nine and one-half cents per pound—the difference between what appellant, under oath, declared its value to be before the fire, and the price for which it sold after the fire.

It is insisted that the appellant should have been permitted to explain why he had not reported to appellee the collection of the insurance money. Appellant did not offer to show that he had neglected to give such information on account of anything done by appellee. What reasons existed in his own mind or what any one not connected with appellee may have done that induced him to withhold such in-

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formation, was entirely immaterial. This action was based and this judgment rendered, not at all because he failed to communicate the fact that he had received such insurance money, but because, under circumstances before stated, he did receive it. And we think interest was properly chargeable against him from the time of its reception.

We think the evidence as to the quantity of butter owned by appellee, upon which appellant received damages of three and one-fourth cents, was such as to warrant the amount of the verdict of the jury.

It appears to us also that unless there was some urgent necessity for a sale of this butter immediately following the making of the award of loss thereon, it was the duty of appellant to have notified appellee of the fire and the probability that his butter had been damaged thereby, in order that he (appellee) might take such action as he thought proper, and that a sale of it without any notice to appellee of such extraordinary occurrence was not such a discharge of his duties as appellee had a right to expect and require. Ewell's Evans on Agency, Marg. p. 213; Story on Agency, Sec. 208; Clark v. Bank of Wheeling, 17 Penn. St. 322.

Taking the instructions as a whole, the law of the case was fairly presented to the jury, and substantially, justice appears to have been done by the judgment.

It is claimed that there is a variance between the evidence and the declaration; also that the evidence does not sustain the declaration. The particular variance alluded to should have been pointed out upon the trial. If this had been done, it might have been removed by amendment. Such action not having been had, it is too late to now insist upon a variance, and the principles applicable after verdict to causes of action defectively stated, apply. Northwestern Brewing Co. v. Manion, 44 Ill. App. 424; City of Bloomington v. Tebballs, 17 Ill. App. 455; I. & St. L. R. R. Co. v. Estes, 96 Ill. 470; Driggers v. Bell, 94 Ill. 223; L. E. & W. R. R. Co. v. Rosenberg, 31 Ill. App. 47; Mackin v. O'Brien, 33 Ill. App. 474; Wight Fire Roofing Co. v. Poczekai, 130 Ill. 139.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

MR. JUSTICE GARY. I think the money received for insurance should be apportioned in the ratio of the actual damage to the insured goods.

RUDOLPH GOTTLIEB ET AL.

V.

CHARLES L. MILLER ET AL.

47	588
54	519
47	588
154	44
47	588
68	43

Insolvency—Preferences.

1. Directors of an insolvent corporation, so utterly insolvent as to have abandoned all effort to continue business, can give preferences to creditors of the corporation having knowledge of its condition.

2. The distinction between a corporation so insolvent as to have stopped business, giving preferences, and one which, by giving a preference, incapacitates itself for further business, has little to recommend it. But the fact that the preference stops the business, does not avoid it.

[Opinion filed January 27, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Messrs. QUIGG & BENTLEY, for Land Owners Building Company, appellant.

Mr. G. W. KRETZINGER, for Thomas Parker, Jr., Receiver, appellant.

Messrs. MORAN, KRAUS & MAYER, for American Oak Leather Company, William H. Johnson, for use of Rudolph Gottlieb, Frederick Oberndorf, et al., appellants.

Messrs. PENCE & CARPENTER, for executors of Leopold Miller, appellees.

Messrs. DUNCAN & GILBERT, for Ignatz Deimel, appellee.

MR. JUSTICE GARY. The facts in this case are very com-

plicated ; to state them at large would occupy a great deal of space, and we have no reason to fear that our decision will be final.

The whole argument of the appellants is based upon the proposition that the directors of an insolvent corporation, so utterly insolvent as to have abandoned all effort to continue business, can not give preferences to creditors of the corporation having knowledge of its condition.

We concede that the facts are with the appellants ; that much authority in other States is with them ; but that the law of this State is with them, we think, can not be conceded.

While it can hardly be said that the proposition of the appellants had, so far as appears, ever been presented before the courts of this State in the concrete form in which it now comes before us, yet there have been cases wrongly decided, or at least the language used in deciding them was wrong, if the law be as appellants claim.

In *Glover v. Wells*, 40 Ill. App. 350, it is said that a corporation has the power to make preferences, "even if insolvent, and for the express purpose of preferring * * * a creditor."

In the same case, under the name of *Glover v. Lee*, 140 Ill. 102, the Supreme Court said the "company had the right to secure one creditor in preference to another."

It is true that these cases, like *Beach v. Miller*, 130 Ill. 162, were at law, but that circumstance has not prevented the equitable doctrine of the latter case being considered authoritative.

The distinction between a corporation so insolvent as to have stopped business, giving preferences, and one which, by giving a preference, incapacitates itself for further business, has little to recommend it. But the fact that the preference stops the business does not avoid it. *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

A special objection to \$6,000 of the Miller judgment would deserve consideration if the appellants urged it ; but the manner in which they treat it leads to the conclusion

that they do not desire a decision based upon that objection only.

The appellants present the case as though nothing short of relief based upon the truth of their proposition would be desirable, and therefore without considering anything but that proposition, we affirm the decree.

Decree affirmed.

47 500
147 550

JOSEPH GREGG

V.

ILLINOIS CENTRAL RAILROAD COMPANY.

Railroads—Storage of Uncalled-for Freight—Appeal and Error.

1. A carrier storing uncalled-for goods, on which the freight has not been paid, should store in his own name in order to preserve his lien. Such carrier is not liable for any default of the warehouseman, if he was guilty of no negligence in selecting him.

2. The finding of the court in a case tried without a jury, upon conflicting evidence, will not be disturbed upon appeal.

[Opinion filed January 27, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

Messrs. OTIS & GRAVES, for appellant.

Mr. C. V. GWIN, for appellee.

MR. JUSTICE GARY. The appellant in July, 1888, shipped five car loads of corn to Augusta, Georgia, by the road of the appellee. By the bills of lading, the corn was consigned to the order of Joseph Gregg & Co., with directions to notify Dunbar & Co.

These bills were attached to drafts and indorsed to a bank

that discounted the drafts. The drafts were drawn on Dunbar & Co., at ten days' sight.

August 11, 1888, Dunbar & Co. wrote to the appellant thus: "No demand for grain to-day, market is so stocked. A large lot of stuff was brought here prior to the advance in freight, and this being our tightest season anyway, everybody has been cramped to pay for it; our banks protected drafts, and loaned on, until they, too, became cramped, and refused to lend any more. The situation is worse than last season, when you remember the same thing occurred. The best way we can get out of the difficulty in meeting your drafts, which begin to mature next week, is to draw back on you for them as they mature, and then let you make new ten day drafts on us, and in this way we can gain about fifteen or sixteen days, and in that time hope to place a great part of it.

We can arrange to take care of the stuff itself without having to keep on track. We will begin to draw on Monday. We await your favors. Yours truly,

DUNBAR & Co."

The appellant's counsel says this letter does not refer to the transactions involved in the suit, but we infer that the court below, where the case was tried without a jury, found that it did.

When the corn actually arrived in Augusta, does not appear, but it was there in the warehouse of Dunbar & Co., stored with them as warehousemen, on receipts to the Georgia R. R. Co., when, on the 10th day of September, 1888, an extraordinary flood came and destroyed it. The Georgia R. R. Co. seems to have been the last connecting road over which the corn was carried to Augusta.

The appellant sued the appellee for the value of the corn and alleges, first, that the Georgia R. R. Co. should have stored the corn in the elevator standing on the higher ground, and operated by parties of better financial standing than Dunbar & Co.

Whether there was room in that elevator was a controverted question on the trial, as well as whether the expense

would not have been greater. The record does not show that the danger from flood could have been anticipated, and so far as appears, there was no imprudence in intrusting the mere custody of the corn to Dunbar & Co.

Second. That the Georgia R. R. Co. should have notified the appellant of the arrival of the corn, and that it was not taken off the hands of the road by surrender of the bills of lading.

Of Dunbar & Co.'s inability, the appellant had notice by the letter of August 11th, whether it related to this corn or not; whether there was a custom to notify, was in dispute; and the direction of the bills of lading, to notify Dunbar & Co., might well be understood by the railroad company as being all that the appellant desired. And in fact if the letter of August 11th referred to this corn, the fair inference is that the very thing the appellant desired to have done with this corn, was done.

The third alleged ground of recovery is, that the corn might have been dried with but little loss. That was a part of the controversy upon which the finding of the court below, upon conflicting evidence, is conclusive.

There were presented to the court eight propositions, of which five were marked refused. What has been said, covers all of them but the last, which asserts that the grain, having been stored in the name of the Georgia R. R. Co., the appellee is liable for any negligence of Dunbar & Co. in trying to save the grain and in drying it.

A carrier, storing uncalled-for goods, on which the freight had not been paid, would naturally store in his own name, to preserve his lien. No authority is cited that he is wrong in so doing, or that he is liable for any default of the warehouseman, if he was guilty of no negligence in selecting him.

On the whole case there seems to be no error, and the judgment is affirmed.

Judgment affirmed.

Poppers v. Meager.

GEORGE S. POPPERS

V.

MARY J. MEAGER.

47 593
148s 192

Landlord and Tenant—Tenant Holding Over.

1. An agreement in a lease to pay so much per day as liquidated damages for each day possession is withheld after the termination of the lease by lapse of time, is valid; not to be treated as a penalty, but enforced.

2. In view of the evidence in the case presented, this court holds that the payment by a party named, of a sum amounting to one month's rent, which was subsequently returned, is not to be regarded as anything more than a mere deposit, to be taken as rent if the negotiations terminated in a lease, and to be returned if they did not. This court holds, in the absence of evidence of any communication between the parties hereto, by which the plaintiff is estopped, that the defendant wrongfully held over, and declines to interfere with the judgment against him.

[Opinion filed January 27, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. JOHN P. AHRENS, for appellant.

Messrs. EASTMAN & SCHUMACHER, for appellee.

MR. JUSTICE GARY. The appellant was tenant of the appellee for a term expiring April 30, 1889, under a lease which contained this covenant on his part:

"Eighth. At the termination of this lease by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and failing so to do, to pay as liquidated damages for the whole time such possession is withheld, the sum of thirty dollars per day."

The rent reserved in the lease was \$500 per month.

About the time that the lease expired—whether before or

after, was the subject of conflicting testimony—the Grand Rapids Furniture Company began negotiations with the appellee, both acting through agents, for a lease of the same premises for a term of five years, the company to deal as it pleased with the appellant, who was holding over without consent of the appellee. That lease was to run from the first day of May, 1889. Leases were prepared by the agent of the appellee, and taken to be considered by the company, but not executed by either party. May 28, 1889, the company paid to the appellee rent (so called in the receipt given) for that month. The testimony was conflicting, whether there was any communication between the parties to this suit after April 30, 1889, until the demand for possession in July.

The appellant being shown the receipt taken by the agent of the company, paid to him, what they, as between themselves, called rent for the premises, for May, June and July.

In July the appellee returned to the company the money received May 28, 1889. On this state of facts the court below found—trying the cause without a jury—that the appellant was responsible for the time he continued in the premises after April 30, at the rate of thirty dollars per day, refusing the propositions of law submitted by the appellant, as follows:

“1. If the court believes, from the evidence, that at or about the time of the expiration of the lease from the plaintiff to the defendant, in question, the plaintiff by her agents entered into negotiations with the Grand Rapids Furniture Company for a lease of the premises in question from plaintiff to said company, and that a draft of such lease was prepared and given to the agent of said company for execution by said company, and to be returned to the plaintiff duly executed by said company the next day, and that said company then paid to the agent of plaintiff the sum of four hundred and sixteen and 66-100 dollars (\$416.66), the amount of rent in and by said draft of said proposed lease provided, for the month of May,

Poppers v. Meager.

1889, and received from said agent of plaintiff the receipt given in evidence for said sum of money, and that the defendant was informed of said negotiations, and of the acceptance of said rent for said month of May by said plaintiff's agents from said company, and that while said negotiations were pending between the plaintiff and said company the defendant remained in the possession of said premises with the consent of said company, and without any demand having been made by the plaintiff upon the defendant for the possession of said premises, and that the defendant paid the rent for said premises to said company for the months of May, June and July, 1889, and that the defendant had no notice that said negotiations between the plaintiff and said company had been declared off before the defendant paid the rent for the month of July, 1889, and that no demand had been made by or on behalf of the plaintiff upon the defendant for the possession of the said premises prior to the latter part of July, or the first day of August, 1889, then as a matter of law, the plaintiff is not entitled to recover any damages against the defendant for holding possession of said premises for the time prior to the making of such demand, although such proposed lease was never in fact executed by said company.

2. If the court believes from the evidence that about the middle of May, 1889, the Grand Rapids Furniture Company made an application to the plaintiff's agents for a lease of the premises in question while the defendant was in possession thereof, and that said plaintiff's agents informed the representatives of said company making said application, that the plaintiff had a tenant there that she or her agents had some trouble with, and that in case said application was accepted, it would have to be with the understanding that the issuing of a lease would be giving possession of the premises; that said agents could not guarantee to put said company into possession, and that said company must take it in that way; that if it wanted to take the chances of litigation with the defendant to oust him, well and good. And if the court further believes from the evidence that said

•

company made its application for said lease upon those conditions, and upon the condition that it was to pay the rent for said premises from May 1, 1889, and that the representative of said company informed said plaintiff's agents that he thought he could arrange with the defendant to buy him out, and that thereupon said company's representative paid to said plaintiff's agents the rent for the month of May, 1889, took away with him the draft of the lease offered in evidence, with the promise on his part that said draft of said lease should be executed by said company and returned to plaintiff duly executed the day following, and if the court further believes from the evidence that the defendant was informed of said negotiations between the plaintiff's agents and said company, and that thereupon an arrangement was made by the defendant and said company whereby the defendant in good faith agreed to sell, and said company agreed to buy, the stock of furniture of the defendant in said premises, and that it was agreed between said company and the defendant that he should remain in possession of said premises until said purchase of said stock of furniture by said company should be consummated, and pay said company during such occupancy the same rent that said company was to pay said plaintiff, and that in pursuance of such agreement the defendant did pay said company such rent for the months of May, June and July, 1889, before the defendant had any notice or knowledge of the arrangement subsequently made, whereby the plaintiff's agents paid back the rent which said company had paid to them, as shown by the evidence, and that no demand was made by or on behalf of the plaintiff upon the defendant for the possession of said premises prior to the latter part of July or the first day of August, 1889, then as a matter of law, the plaintiff is not entitled to recover any damages against the defendant for holding the possession of said premises for the time prior to the making of such demand.

3. The provision in the lease from the plaintiff to the defendant, offered in evidence, providing that in case of the defendant failing at the termination of said lease, by lapse of time or otherwise, to yield up immediate possession of the

Poppers v. Meager.

premises to the plaintiff, he should pay as liquidated damages, for the whole time such possession is withheld, the sum of thirty dollars per day, under the evidence in this case must be held to be a provision for a penalty only, notwithstanding the language 'liquidated damages' is used, and that under the evidence in the case, the plaintiff is entitled to recover only such actual damages as the evidence shows the plaintiff sustained by reason of the failure of the defendant to yield up the possession of said premises at the expiration of said lease."

The first and second propositions are based upon the contingency that "the court believes from the evidence" certain conclusions.

We can not know whether they were rejected because the court did not so believe, or because the court did not agree with counsel as to the legal consequence.

The court, upon the conflicting evidence, probably found that there were no communications between these parties after April 30, 1889, except the demand for possession recited in the propositions, and that the payment to the appellee by the company on May 28, 1889, was only provisional, having no effect if not followed up by the execution of the lease. It is clear that if the company did not acquire the right to the possession of the premises by the payment on May 28, 1889, and if there was no communication between these parties by which appellee is estopped, then the appellant has wrongfully held over.

We think that the true conclusion is, that the payment is not to be regarded as anything more than a mere deposit, to be taken as rent if the negotiations terminated in a lease, and to be returned, as was done, if they did not.

The agreement to pay thirty dollars per day while holding over, is valid; not to be treated as a penalty, but enforced. *Griffin v. Knisely*, 75 Ill. 411; *Higgins v. Halligan*, 46 Ill. 173.

There is a little uncertainty as to when the appellant moved out, but the finding of the court below is not to be disturbed unless it definitely appears to be wrong. The judgment is affirmed.

Judgment affirmed.

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WILLIAM F. McLAUGHLIN

V.

JOSEPH E. HINDS ET AL.

Practice—Improper Action of Attorneys and Jury—New Trial.

1. This court condemns the conduct of jurors and certain attorneys in the case presented, they having adjourned to a neighboring saloon after the verdict had been sealed and before it had been opened and rendered, and there indulged in conversation, and “treats” at the expense of one of said attorneys.

2. Such occurrence, to be used as an objection to the verdict, should be interposed before the same is opened and read.

[Opinion filed January 27, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. CRATTY BROS. and MACLAREN & JARVIS, for appellant.

Mr. SIDNEY SMITH, for appellees.

MR. JUSTICE SHEPARD. The contract out of which the controversy between the parties to it arose, resulting in this appeal from the judgment of the Circuit Court, was as follows:

“Chicago, 6, 28, 1888.

“We, the undersigned, agree to furnish Mess. W. F. McLaughlin & Co. five million coffee wrappers, to be of same paper exactly as sample attached and marked A. Printing to be same as sample attached, signed and marked B. Colors of printing and color work to be exactly same as sample attached, signed and marked C. For said wrappers W. F. McLaughlin & Co. to pay at the rate of one dollar and ninety-five cents (\$1.95) per M, f. o. b. Chicago. First

McLaughlin v. H.

car to be delivered in Chicago, Jan. 1, 1888, and one car the first of each month thereafter until contract is completed. Sample lot of 500,000 to be shipped as soon as convenient. This order is contingent on above sample lot being satisfactory to McLaughlin & Co., as regards conditions of contract for large lot.

“HINDS, KETCHAM & Co.”

The law of the case was correctly applied by the court in the instructions to the jury, and in its rulings upon the evidence offered, as we interpret the contract.

Upon the facts, concerning which the evidence is full of conflict, the conclusion of the jury should not be overturned without much weightier reasons than we are able to discover in the record.

On the question raised by reason of some of the jurors accompanying Ludden, who assisted in the trial as an attorney for the appellees, to a neighboring saloon, after the verdict had been sealed, and before it had been opened and rendered, and there indulging in conversation, and “treats” at the expense of Ludden, and the joining there in conversation and festivities by Moore, who assisted at the trial as an attorney for the appellants, we could not, if we were to try, speak in language sufficiently condemnatory of such conduct, by both jurors and attorneys.

Neither would we hesitate to set aside a verdict and judgment in a case where such conduct had been indulged in, if the party calling our attention to it in the conclusive manner herein established, had performed his duty in the premises.

But the conduct complained of occurred on the evening of one day, and the sealed verdict was not opened until ten o'clock on the following morning.

One of the attorneys for the plaintiff actually participated in the occurrence, and if it were to be used as an objection to the verdict, it should have been interposed in a proper manner, before the verdict was opened and read. To hold otherwise, would be to allow counsel to speculate on the result of the verdict, and to urge it

as an objection or not, as his client's interests might be affected. Stampofski v. Steffens, 79 Ill. 303. We do not think, under such circumstances, that the trial court erred in overruling the motion for a new trial, for anything that was then made to appear concerning the conduct of the jurors and attorneys in the case.

We fail to discover any sufficient error in the record to justify us in reversing the cause, and the judgment of the Circuit Court will therefore be affirmed.

Judgment affirmed.

THE HOME INSURANCE COMPANY

V.

PATRICK H. TIERNEY.

Municipal Corporation—Ordinance—Boiler Inspector—Recovery of Fees of.

1. Where a person sues or defends in his own right as a public officer, it is not enough that it shall appear that he is an officer *de facto*. It must also be made to appear that he is an officer *de jure*.

2. In an action brought by an alleged boiler inspector of the city of Chicago, to recover fees alleged to be due, the testimony of such person that he is such inspector, should not be admitted. His appointment as inspector should appear by the production of evidence showing that the same was in conformity with the ordinance relating to the inspection of steam boilers.

[Opinion filed January 27, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. VALLETTE & GRIFFEN, for appellant.

No appearance for appellee.

MR. JUSTICE SHEPARD. The appellee (plaintiff below)

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brought suit to recover for fees claimed to be due him as boiler inspector of the city of Chicago, for the inspection of some boilers belonging to the appellant, and this appeal is from a judgment rendered in his favor.

On the trial, appellee testified against objection by appellant that it was not the best evidence, that he was boiler inspector of the city of Chicago on March 24, 1891, that two of the boilers were inspected on that day, and that the others were inspected in February. There was no evidence offered that he was boiler inspector in February.

The appellee introduced in evidence the ordinances of the city of Chicago, relating to the inspection of steam boilers, from which it appears that a boiler inspector shall be appointed by the mayor, by, and with, the advice and consent of the city council. The ordinance fixes the fees of the inspector, and prescribes his duties, among which is one that he shall "on the written application of the owner or agent of any boiler," etc., inspect the same. The ordinances further make it the duty of every owner of a boiler to have the same inspected as often as once in each year, and to make therefor an application in writing to the inspector, requesting him to inspect the same, and affix a penalty upon every owner who shall neglect his duty in that regard. It appeared on cross-examination of the appellee, that no written application was made to him to make the inspection for which he claimed fees.

At the conclusion of plaintiff's case, the appellant moved the court to instruct the jury to find for the defendant, for the reasons that no legal proof of the official character of the plaintiff had been made, and that it appeared that no application in writing, for the inspection, had been made, as required by the ordinances. But the court refused to so instruct the jury, and exception to the ruling was duly taken.

The law is well settled that where a person sues or defends in his own right as a public officer, it is not enough that it shall appear that he is an officer *de facto*. It must also be made to appear that he is an officer *de jure*. *Out-house v. Allen*, 72 Ill. 529; *Vaughn v. Owens*, 21 Ill. App.

249; *People v. Weber*, 89 Ill. 347; *People v. Weber*, 86 Ill. 283.

It is said in *People v. Hopkinson*, 1 Denio, 574, "Clearly, he can not recover fees, or set up any right of property, on the ground that he is an officer *de facto*, unless he be also an officer *de jure*," and a large number of cases are cited in support of the statement.

In the case at bar, the only right in appellee to recover the fees claimed, rested upon the fact of his being a legally appointed inspector under the ordinances of the city.

His testimony that he was such inspector, was improperly admitted. He should have been required to show his appointment as inspector, by the production of evidence of his appointment by the mayor, and the consent of the city council thereto, as provided by the ordinance.

Having failed to introduce such evidence, his right to recover was not shown.

The appellee not having filed a brief in this court, we do not decide any other of the questions involved.

The judgment of the Circuit Court will, for the reason given, be reversed and the cause remanded.

Reversed and remanded.

LEOPOLD J. KADISH ET AL.

V.

THE GARDEN CITY EQUITABLE LOAN & BUILDING
ASSOCIATION ET AL.

Building and Loan Associations—Appeal and Error—Preference.

1. That a loan obtained from a building association was procured for the use of some person other than the borrower, can not affect the validity of a transaction involving a loan, as to the parties to it, and it is competent for the loan association to be secured in such case by a trust deed given by such third party.

2. The giving of such trust deed does not operate to make such third party a member of such association.

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Kadish v. Garden City Loan & Bldg. Ass'n.

3. A business corporation, possessing no essential of a public corporation and endowed with no public franchise, having obtained a loan from a loan association, is estopped from denying the power of the latter to make the loan in any proceeding begun to enforce the payment of the loan, likewise all persons having dealings with such corporation, especially where the guarantors of the bond given upon the procurement of the loan were the directors of the business corporation, and the active agents in procuring the loan, and a judgment creditor having notice of the loan through the recording of the trust deed given to secure it.

4. Where the making of a loan was *ultra vires*, good faith demands that the borrower, as well as the creditors thereof, with notice, shall not be relieved, except by payment back of the money.

5. No notice will be paid by this court to alleged errors on the part of a master relating to the allowance of solicitor's fees and the like, the same objections not having been interposed before him.

6. In the case presented, this court holds that there is nothing in the contention that the cross-bill ought to have been dismissed, because the original bill was not prosecuted to a decree, and that the decree upon the cross-bill, purporting to be on the original as well as on the cross-bill, with a finding and order that there remained no subject-matter for the original bill to act upon, was regular and proper.

[Opinion filed January 27, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

MESSRS. KRAFT & KRAFT, for appellants.

MR. JULIUS STERN, for appellees.

MR. JUSTICE SHEPARD. The decree, to reverse which this appeal is prosecuted, was entered in the Circuit Court in favor of the appellee, the Garden City Equitable Loan & Building Association, an Illinois corporation, upon its amended cross-bill filed for the foreclosure of two certain trust deeds in its favor, to secure loans made by it of \$20,000 and \$5,000, respectively.

The original bill was filed by appellant, Leopold J. Kadish, as a stockholder, for the purpose of winding up the affairs of the Chicago Co-operative Brewing Association, an Illinois corporation.

Two days before the original bill was filed, Albert Florus, one of the appellants, entered judgment by confession against the said Co-operative Brewing Association for the sum of \$2,075, upon a judgment note in his favor, and the sheriff, by virtue of an execution issued upon said judgment, had levied upon and taken possession of all the property of the Brewing Association.

It is averred in the original bill that Florus, the judgment creditor, was at the time of the giving to him of said judgment note, and of the confession of judgment thereunder, and still was a director of said Brewing Association, and that, because thereof, said judgment constituted an unlawful preference to him.

The appellee Loan Association was made a party defendant to the original bill, and, by leave of court, filed its cross-bill to foreclose the two trust deeds held by it, as aforesaid, against the identical property levied upon by the sheriff under the Florus execution.

A receiver was appointed, and the sheriff, by order of court, turned over to the receiver the property held by him under the Florus execution, the rights of the respective parties being reserved and transferred to the proceeds which might arise from a sale of the property by the receiver.

The evidence discloses, and it is substantially conceded, that on the fifth day of July, 1886, Leopold J. Kadish and Ernest A. Kadish, both of whom were stockholders in the Pilsen Brewing & Malting Company, being each the owner of one hundred shares of stock in the Garden City Equitable Loan & Building Association, of Chicago, at a regular meeting of the board of directors of the said association, were each awarded a loan of \$10,000 upon their respective certificates of stock by said association, and executed their individual bonds to said association, for the money so advanced and loaned to them upon said stock, which bonds were secured by a deed of trust upon the real estate of the Pilsen Brewing & Malting Company, described in said deed of trust, and the money so obtained by the said Kadishes was applied to the use of the said Pilsen Brewing

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& Malting Company, of which the said Leopold J. Kadish at the said time was the president.

Subsequently, in the month of January, 1887, the Chicago Co-operative Brewing Association was organized, and purchased the entire plant of the said Pilsen Brewing & Malting Company, subject to the aforesaid incumbrance, which they assumed and agreed to pay as part consideration, and for some time continued to make the payments due upon the aforesaid bonds, according to their terms and the terms of the said deeds of trust; but, becoming embarrassed for want of money, the said Co-operative Brewing Association applied to the said, the Garden City Equitable Loan & Building Association, for an advance and loan of \$5,000, upon fifty shares of new stock in the said Building Association, purchased by the said Co-operative Brewing Association, for the purpose of enabling it to obtain such advance, which advance and loan upon fifty shares was made to the said Co-operative Brewing Association on the 15th day of August, 1887, and for which it gave its bond, signed by L. J. Kadish, president, and Herman Nathan, secretary; the said L. J. Kadish, president of said Co-operative Brewing Association, being the same person who, while president of the Pilsen Brewing & Malting Company, had made an individual loan of \$10,000, as above stated; and the last described bond was secured by a further deed of trust upon the premises, which had been purchased by the said Co-operative Brewing Association from the said Pilsen Brewing & Malting Company, being in the nature of an additional mortgage on said premises.

To further secure the payment of the last-named bond, in accordance with its terms, the said bond was guaranteed in writing by the said Leopold J. Kadish individually, and by George Heinzman, J. F. Buehrer, Herman Nathan, Joseph Schroeder, Herman Fink, Thomas Nalipinski, and Louis Groskopf, they then being the directors of the said Co-operative Brewing Association.

It appears that, by order of the Circuit Court, the receiver made a public sale of the property of the Brewing

Association, and that the appellee Loan Association was the purchaser of the same for the sum of \$22,170, and that, by application of the amount of said sale, the bonds for \$20,000, made by the Kadishes, were disposed of, and about \$2,000 applied on the \$5,000 bond, guaranteed by the appellants (except Florus).

Such proceedings were subsequently had in the said cause, that finally, on the 23d day of May, 1892, a decree was entered in the Circuit Court in favor of the cross-complainant, the Garden City Equitable Loan & Building Association, and against the appellants herein (excepting Albert Florus), for the unpaid portion of the money due upon the bond whereon they are individual guarantors, and confirming the sale of the premises described in said deeds of trust to the Garden City Equitable Loan & Building Association, on account of the moneys due to it, at the public sale made by the receiver in this cause.

It will be observed that all of the appellants, excepting Albert Florus, were guarantors on the bond of the Chicago Co-operative Brewing Association for the said loan of \$5,000, they being at that time stockholders in, and directors and managers of the said Brewing Association; and that Albert Florus, the other appellant, was a director of the said Brewing Association at the time of receiving from it the said judgment note, upon which execution was issued, levied, and the business closed up.

One Christian Kruger also filed his cross-bill in said suit, and by the decree of the Circuit Court was given a first lien to the extent of \$364 upon the premises involved, for work and labor done in the repair of the Brewing Association buildings.

It is mainly because the decree of the Circuit Court subordinates the lien of the execution on the Florus judgment to that of the two trust deeds which were given and recorded long before the judgment was recovered, and to the decree in favor of Kruger for a mechanic's lien, and awards to the Loan Association a personal money decree against the other appellants, who were guarantors of the \$5,000 bond, that the appellants seek redress by this appeal.

Kadish v. Garden City Loan & Bldg. Ass'n.

It is admitted by both sides, that the loan of \$20,000 was procured by the Kadishes for the use and benefit of the Pilsen Brewing & Malting Company, and that the money was actually received by and paid to said Pilsen Company; and also that the second of said trust deeds was made by the Chicago Co-operative Brewing Association, (the successor and vendee of the Pilsen Brewing & Malting Company,) and that the said \$5,000 secured thereby, was actually received by the said co-operative association.

Appellants, however, insist that the loans made by the said Loan and Building Association to Leopold J. Kadish and Ernest A. Kadish, for the use of Pilsen Company, and to the Co-operative Brewing Association, who was the successor to the said Pilsen Company, were in violation of the act under which said Building Association was organized (being organized under the general building association law of Illinois), and that the bonds of Leopold J. and Ernest A. Kadish, as well as the bond of the Co-operative Brewing Association, were absolutely null and void, and that no recovery could be had thereon, and that inasmuch as the bonds of said parties were null and void, the trust deeds to secure said bonds made in furtherance of the said unlawful transactions, also were of no force and effect, and that no right accrued thereunder to said cross-complainant.

As to the first loan of \$20,000 procured by the Kadishes, and secured by the trust deed given by the Pilsen Company, we see no occasion for hesitation in upholding its validity.

The Kadishes, as individuals, were competent to become members of the Loan Association, and, as such, to borrow money from it; and the Loan Association had the express power under the statute to admit them as members, and to loan money to them.

That the loan was procured by the Kadishes for the use and benefit of some one other than themselves, could not affect the validity of the transaction as to the parties to it. Each one being competent to deal with the other, the transaction would not be invalidated because one of the parties intended to, and did actually, give to a third party the benefit and fruit of the agreement.

“There is nothing either in the letter or the spirit of the act * * * that makes it the duty of the association to inquire for what purpose loans are being obtained, or to require any stipulation from the borrower as to the use he shall make of the money, or in any manner to supervise or control its disbursements.” *Juniata B. and Loan Association v. Mixell*, 84 Pa. St. 313.

Neither can it be doubted that it was competent for the Loan Association to be secured by the trust deed given by the party, the Pilsen Company, who was the real beneficiary. *Ibid*.

The giving of said trust deed by the Pilsen Company to secure the bonds of the Kadishes, even though the money loaned on the faith thereof to the Kadishes was for the use and benefit of the Pilsen Company, did not make the latter company a member of the loan association, and the question as to the power of one corporation to become a member of another corporation, can not be said to fairly arise in the determination of the validity of the first trust deed to secure the Kadish bonds for \$20,000.

This brings us to a consideration of the objections urged against the second trust deed, and bond for \$5,000, given by the Co-operative Brewing Association for the loan of that amount made to it directly by the loan association.

Whether there is contained within the letter or the spirit of the statute under which loan and building associations are incorporated, a prohibition against a business corporation, possessing no essential of a public corporation and endowed with no public franchise, becoming a member of a loan association for the purpose of borrowing money from it, or against a loan association admitting such a business corporation into its membership and making loans of money to it, need not be decided in this case.

The business corporation having obtained a loan of money from a loan association, would most certainly be estopped from denying the power of the latter to make the loan, in any proceeding begun to enforce the payment of the loan; and so, we think, should all persons having dealings with

such business corporation, where, especially, as in this instance, the guarantors of said bond were the directors of the business corporation and the active agents in procuring the loan, and Florus, the judgment creditor, had notice of the loan through the recording of the trust deed given to secure it.

At the most, the making of the loan by the Loan Association was an act *ultra vires*, and good faith demands that the Brewing Association, as well as its creditors with notice, shall not be relieved except by payment back of the money. 2 Morawetz on Private Corporations, Sec. 689; N. W. Br'g Co. v. Manion, 44 Ill. App. 424; Bradley v. Ballard, 55 Ill. 413; Building Ass'n v. Crowell, 65 Ill. 453; Darst v. Gale, 83 Ill. 136; R. R. Co. v. Thompson, 103 Ill. 187; Brewing Co. v. Flannery, 137 Ill. 309.

As to the assigned errors relating to the allowance of solicitor's fees, and the decree in favor of Kruger for a mechanic's lien, it is enough to say that the record discloses no objection filed before the master, to either.

To be entertained, such objections must first have been interposed before the master. Waska v. Klaisner, 43 Ill. App. 611, and authorities there cited.

As to the assignment of error that the cross-bill ought to have been dismissed because the original bill was not prosecuted to decree, we think there is no foundation for it.

The decree as entered purports, on its face, to be upon the original bill as well as upon the cross-bill, and specially finds that the allegations of the bill concerning the insolvency of the Brewing Association are true, and that the purposes of the bill have been attained by a sale and distribution, among the persons entitled thereto, of the assets of the insolvent association; and that its other allegations, among which was one that the confession of judgment in favor of Florus was unlawful, were not sustained.

Furthermore, the cross-bill set up additional facts, not alleged in the original bill but germane thereto, concerning the trust deeds and bonds, and the guaranty of one of the latter by the original complainant and others, and prayed for

affirmative relief against him, and the subject-matter that he had brought into court.

In such a case, a decree upon the cross-bill, with a finding and order such as was contained in the decree, that there remained no subject-matter for the original bill to act upon, was entirely regular and proper. It is unlike where a cross-bill sets up only matter purely defensive. 2 Daniell's Chancery Pleading and Practice, 1553, Note 3.

The lien of the Florus judgment was subsequent in point of time to that of the two trust deeds, and, for the reasons stated, subject thereto, as well as to the lien in favor of the mechanic, Kruger.

We fail to find any error in the record, and because the decree seems in all respects to be just and proper, it will be, accordingly, affirmed.

Decree affirmed.

WEST CHICAGO STREET RAILROAD COMPANY

V.

PATRICK MARTIN.

Railroads—Negligence of—Personal Injuries—Instructions.

1. A common carrier is under obligation to use the highest diligence to prevent injuries to passengers from collision with cars or engines of another road, and where passengers themselves, guilty of no negligence, are injured in consequence of such collision, a *prima facie* presumption of negligence on the part of the carrier arises. The duty of the carrier depends upon the circumstances surrounding the carriage.

2. A court refusing to admit a given contract in evidence, should not give instructions based upon the hypothesis that such a contract existed.

3. If an instruction is proper it will not be made vicious because given at the instance of one who was not in a position to demand it.

4. If the safety of passengers upon a train approaching a point where tracks cross, depends upon the going forward of servants of such train to scan the track to see whether other trains are approaching, it is negligence to fail to do so.

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West Chicago St. R. R. Co. v. Martin.

[Opinion filed January 27, 1893.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Appellee, on the morning of the 4th of July, was being carried as a passenger by appellant.

The car in which he rode while crossing the tracks of the Chicago & North Western Railway Co., was struck by an engine belonging to that road, and appellee sustained serious injuries.

He brought an action against each of the railway companies, joining them as defendants, and recovered against both a verdict and judgment for \$12,000; from this judgment appellant, alone, has taken and prosecutes this appeal.

Upon the trial there was evidence that upon the arrival of appellant's car at the Rockwell street crossing, the gates there placed were down, and a freight train was passing; that as soon as the gates were raised by the man in the signal tower, appellant's conductor, who had gone ahead of the car, gave a signal to the driver to come on; that he gave this signal before the freight train had completely passed; that as soon as the freight train was entirely by, the driver of appellant's car started on and went directly in front of an engine going in a direction opposite to that in which the freight train was moving; that this engine belonged to the North Western Railway Company, and had no light save a small lantern; it struck appellant's car, throwing it some thirty feet.

Messrs. KEEP & LOWDEN, for appellant.

Messrs. RICHOLSON, MATSON & PEASE, for appellee.

MR. JUSTICE WATERMAN. A common carrier is under obligation to use the highest diligence to prevent injuries to passengers, from collision with cars or engines of another road; and where passengers, themselves guilty of no negli-

gence, are injured in consequence of such collision, a *prima facie* presumption of negligence on the part of the carrier arises.

In the present case, not only was there under the undisputed evidence, such presumption, but from the testimony of the witness Southworth as to the conduct of the conductor of the car in which appellee was riding, the jury might have found that appellant was negligent.

Under the evidence the jury were fully warranted in finding a verdict against appellant, and it is in view of such evidence that the errors committed by the trial court must be considered.

Upon the trial the North Western Railway Company offered in evidence an alleged contract between it and appellant, relating to the duty of appellant in looking out at the Rockwell street crossing for trains belonging to the Northwestern road. The introduction of this being objected to, the court refused to admit it, yet gave two instructions based upon the hypothesis that such a contract existed.

This was obvious error, yet we do not think that appellant was prejudiced thereby.

The first of the two instructions relating to the alleged contract concludes as follows:

“The jury are instructed, as a matter of law applicable to this case, that if they believe from the evidence that the Chicago West Division Railway Company, of which the defendant, the West Chicago Street Railroad Company, is the successor, entered into a contract with the defendant, the Chicago & North Western Railway Company, regarding the crossing of the tracks of the two companies at West Madison and Rockwell streets, and that it was agreed in said contract that it should be the duty of the employes of the street car company to ascertain, before attempting to effect a crossing, whether an engine or train of the Chicago & North Western Railway Company was approaching Madison street in either direction, and if you believe from the evidence that such contract was in force, and binding upon the defendant, the West Chicago Street Railroad

Company, at the time of the accident, and that the servants of said company were guilty of negligence as charged by the plaintiff in his said declaration, and as a result of such negligence, if any, the street car was struck and the plaintiff injured, while he was in the exercise of ordinary care for his own safety, you will find the defendant, the West Chicago Street Railroad Company, guilty."

Conjoined as was the reference to the supposed contract between appellant and the North Western Railway Company, with the statements concerning a finding of negligence on the part of appellant, and ordinary care by appellee, the entire instruction became, in this case, harmless, for clearly, if what follows after the words "and that the servants of said" be true, a verdict should have been given against appellant.

The second instruction upon this subject was: "The jury are instructed, as a matter of law applicable to this case, that by virtue of an agreement between the Chicago West Division Railroad Company and the Chicago & North Western Railway Company, introduced in evidence (it being admitted that the defendant, the West Chicago Street Railroad Company, is the successor of the said Chicago West Division Railroad Company), it was the duty of the conductor, or other employe of the street railroad company, to exercise all reasonable precautions to ascertain himself, before attempting to go over the crossing with a street car, whether an engine or train of the railway was approaching Madison street in either direction."

The allusions to the contract, of which there was no evidence, ought not to have been made, but the pith of the instruction, that "it was the duty of the conductor to exercise all reasonable precautions to ascertain himself, before attempting to go over the crossing with a street car, whether an engine or train of the railway was approaching Madison street in either direction," was a very mild way of stating the high degree of diligence appellant was bound to exercise.

The court, at the instance of the Chicago & North West-

ern Railway Company gave the following instruction: "The jury are instructed, as a matter of law applicable to this case, that if you believe from the evidence that the plaintiff, for a reward, became a passenger upon said street car, and was injured while being carried, such injury raises a presumption of negligence on the part of the defendant, the West Chicago Street Railroad Company, and to rebut such presumption and to prevent a recovery against it, said defendant must show affirmatively, that it was free from any negligence charged in the declaration contributing to such injury, if it shall appear from the evidence that the plaintiff was, before and at the time of his injury, exercising ordinary care for his own safety."

While we hardly see upon what theory the North Western Railway Company was entitled to have given instructions as to the duty and liability of appellant, yet if an instruction is proper, it will not be made vicious because given at the instance of one who was not in a position to demand it.

The instruction is faulty, and in many cases would be likely to mislead; but under the state of the case in which it was given, we do not think that the jury could have been misled thereby. This cause was not tried upon the theory that it was sufficient for the plaintiff to present its declaration and there stop; much, and, as we think, sufficient evidence was adduced by the plaintiff to sustain the allegations thereof; and the jury could, under the circumstances, have understood this instruction only as telling them that, under the undisputed facts, the burden rested upon appellant of showing that it had not been guilty of the negligence charged in the declaration, of which a *prima facie* presumption was raised by the plaintiff's evidence.

It is urged that the plaintiff did not, in his declaration, proceed upon the theory that being a passenger of appellant, a collision occurred, by which he was injured, and that thereby a presumption of negligence of the carrier arose; but instead, went on to specify negligence of which he alleged appellant had been guilty; that such being the

declaration, a recovery can only be had upon proof of the negligence specified therein. And it is asked if this court will presume not only that the collision occurred through the negligence of appellant, but through the specific negligence set forth in the declaration.

The court was not, under the evidence, called upon to presume that the collision occurred in consequence of the negligence of appellant; we think that the evidence tended so strongly to show a neglect on the part of appellant to use the high degree of diligence its obligation to appellee demanded, that had there been a verdict for appellant, it would have been the duty of the trial court to set the same aside. *Central Passenger Ry. Co. v. Kuhn*, 86 Ky. 578.

A common carrier of passengers is bound to provide for their safety, so far as human foresight and care can. *Hutchinson on Carriers*, Sec. 501.

What a carrier is to do in this regard depends upon the circumstances surrounding the carriage; and it is difficult to say what the limitations of care are, beyond which a carrier need not go, at grade crossings, over which locomotives pass at frequent intervals. Such crossings are well known to be places of imminent peril; collisions at them are not of infrequent occurrence; the diligence of the carrier at these points must be proportioned to their well known danger.

A declaration in this case alleged that the servants of appellant failed, at the crossing, to go forward upon the tracks of the North Western Railway Company to a position where could be ascertained the fact whether or not the cars of said North Western Railway Company were approaching said crossing. We think that it was appellant's duty so to have done, and that the evidence shows that there was such failure. If the safety of its passengers depended upon a search up and down the North Western track, we think such search should have been made.

It is immaterial that the negligence of the Chicago & North Western Railway Company may have been greater than that of appellant; the question presented, so far as appellant is concerned, is, did it perform its duty toward appellee, its passenger?

We do not wish to be understood as approving of the giving in this case of either of the instructions commented upon. We disregard whatever error there was in giving them, because of the facts clearly proven in the case, and affirm the judgment, because, however defectively the negligence of appellant shown upon the trial is stated in the declaration, enough is there stated to, under the evidence in the case, warrant the judgment rendered.

Judgment affirmed.

GRAND LODGE OF THE ANCIENT ORDER OF UNITED
WORKMEN OF ILLINOIS,

V.

MINNIE E. CRESSEY.

Life Insurance—Mutual Benefit Association—Non-Payment of Assessment—Suspension from Membership.

1. Application for reinstatement in a mutual benefit association amounts to an acknowledgment that applicant was lawfully suspended.

2. When at the time of such application assessments have not been paid up, and applicant offers to pay them, it will be assumed that he had notice that he was delinquent as to them.

3. The contract of insurance is essentially one of good faith; a reinstatement obtained upon false and fraudulent representations, will not be binding on the insurer.

4. The fact that, after the reinstatement of such member, his subordinate lodge allowed him sick benefits, or paid assessments for him, can not conclude the Grand Lodge from setting up the defense of fraud, in obtaining reinstatement.

[Opinion filed January 27, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

Mr. JOHN P. AHRENS, for appellant.

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The payment of assessments must be proved to make out a *prima facie* case. *Suppiger v. Cov. M. Ben. Ass'n*, 20 Ill. App. 595; *Mut. Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123; *Conn. Mut. L. Ins. Co. v. Rogers*, 119 Ill. 474.

The overruling of the motion to instruct the jury to find for the appellant, it is respectfully submitted, was sufficient error to sustain the motion for a new trial.

There can be no doubt that Cressey's beneficiary certificate was legally suspended on the 28th day of April, 1888, *Benev. Soc. v. Baldwin*, 86 Ill. 479.

That being the case, plaintiff's next position on the trial below was that said beneficiary certificate was reinstated, or in any event that the defendant Grand Lodge is estopped from denying its reinstatement.

It must be borne in mind that Cressey himself did not pay his arrearages. They were paid by Elmslie; neither did Cressey pay any subsequent assessments. They were paid for him by Victor Lodge. The certificate of health upon which the reinstatement was based, was absolutely required by the law above set forth, because more than thirty days had elapsed since the suspension. Cressey, as a member of the order, was bound to take notice of, and by presumption of law knew the requirements of this law. *Niblack on Mut. Ben. Soc.*, Secs. 12 and 166, and authorities cited; *Bacon on Ben. Soc.*, Sec. 81.

Hence, when Cressey, in his letter to Elmslie, requested him to pay up said Cressey's assessments and have him reinstated, he knew that it would be necessary for Elmslie to present a certificate of health before he could be reinstated; and for that reason undoubtedly, he wrote Elmslie that he, Cressey, was feeling first rate and never felt better in his life, notwithstanding he was in the last stages of consumption.

He therefore constituted Elmslie his agent to procure his reinstatement, and necessarily empowered him to do all that was necessary to that end, and was bound by the representation and agreement in the certificate of health to the same extent as if he had signed it himself.

Without a certificate of health, Cressey could not in any

event have been reinstated. "The membership of the deceased was subject to the operation and effect of the by-laws of the society, and as they were reasonable, it was the duty of the court to protect the corporation in enforcing them." Niblack on Mut. Ben. Soc., Sec. 325, and authorities cited.

It can not be held that Cressey was not bound by the certificate because he did not sign it, without also then holding that the certificate was absolutely void and of no effect, and that said Cressey, therefore, in effect, was reinstated without any certificate of health at all.

In other words, it must be held that the certificate of health was the certificate of said Cressey for all purposes, and that he was bound by the agreement therein contained, or else that it was no certificate of health at all; in either of which cases the reinstatement was void.

If it be held that Cressey was bound by the certificate to the same extent as if he had signed it himself, then the reinstatement was void, because Cressey then was *not* in sound bodily health, in which event he expressly agreed in the certificate the reinstatement should not be binding.

If, on the other hand, it be held that the certificate, because not signed by Cressey, was not binding upon him, then the reinstatement was void, because it was effected by fraud upon the Grand Lodge in presenting to it a fraudulent certificate purporting to be signed by said Cressey, which in fact, then, must be held to be a forgery.

It is no answer to say that because the forgery was not committed by Cressey it does not affect him. He and the appellee can not attempt to take advantage of the wrong which they do by insisting that the reinstatement was made without being parties to or affected by the fraud of which they seek to take advantage.

There can be no doubt it was absolutely false and untrue that Cressey was in sound bodily health on June 27, 1888, when he was reinstated on that certificate.

The evidence of this is not only the proof of death, but the deposition of said Dr. Day, taken in this case, also shows this beyond a doubt.

Hence, in every view of the case, the fact remains that this reinstatement was obtained upon a certificate of health which was absolutely false and untrue, and the same principle of law must necessarily apply to this case that is applicable to the case where a beneficiary certificate is procured in the first instance by false statements of health on the part of the applicant.

That such statements avoid the beneficiary certificate was decided by the Appellate Court of this district in a well-considered opinion by Justice Bailey in *Supreme Council of the Royal Arcanum v. Lund*, 25 Ill. App. 492. See also *Jeffery v. Life Ins. Co.*, 22 Wall. 47; *Ætna L. Ins. Co. v. France*, 91 U. S. 510; *Cont. L. Ins. Co. v. Rogers*, 119 Ill. 474.

Mr. FRANK J. LOESCH, for appellee.

The giving of notice is a condition precedent and good standing is not lost by a failure to pay an assessment of which no notice was given, through the fault or misconduct of a supreme lodge or society, or its officers. *Niblack on Ben. Societies*, Sec. 284; *Covenant Mut. Ben. v. Spies*, 114 Ill. 463.

In *Brogræfe v. Knights of Honor*, 22 Mo. App. 127, 147, the court say: "The laws of this order, as set out in the opinion of the court, make the fact of the mailing of this second notice, or warning, and its disregard by the member for the space of fifteen days, *ipso facto*, a suspension of the member, whether it was in fact transmitted to him by the servants of the postoffice or not, and, under the rule which works a forfeiture upon proof of the mere fact of mailing, without proof of the fact of delivery, it is a fair conclusion that evidence of the fact of mailing ought to be clear." *Supreme Lodge v. Dalberg*, 37 Ill. App. 145, S. C., Sup. Ct., 28 N. E. 785; *Mutual Fund Life Soc. v. Hamlin*, 139 U. S. 297.

When Elmslie, at Cressey's request, and on his promise of repayment, advanced the money necessary to secure Cressey's reinstatement, it had the same effect as if Cressey had remitted to Elmslie the necessary cash payments. Instead of

insisting on the money, Elmslie accepted Cressey's promise to repay it later on. But with this private arrangement of debtor and creditor the lodge could have no concern, nor could it inquire into the matter and refuse to accept payment because Elmslie was loaning the sum to Cressey. In paying the money, Elmslie acted as Cressey's agent, and after its payment Elmslie could not have withdrawn it. The payment having been made, and Cressey relying upon it as having secured his reinstatement, the appellant as well as Victor Lodge would thereafter be estopped in denying the reinstatement to the prejudice of Cressey or of appellee. "A condition once waived is forever gone." *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474.

Counsel insists, however, that as Cressey paid no subsequent assessments, there is nothing for him to rely on and no estoppel can be urged against appellant.

This is certainly a misconception of the record. Cressey, relying on his reinstatement, some time in July or early in August applied to Victor Lodge for sick benefits, and they were granted. If his reinstatement was invalid, then he should have been informed of it when he applied for sick benefits, and the cause given him why his reinstatement was alleged to be invalid. If it was because Elmslie had loaned him the necessary money to secure his reinstatement, then he should have been so told, in order to enable him to repay Elmslie at once. If it was alleged to be invalid because he did not himself sign the certificate of health, then he should have been given the opportunity to sign it. If it was because the certificate of health was alleged to be untrue, then he should have had the chance to establish its truth. On the contrary, his restoration was not challenged, but his application for sick benefits was granted and payments continued till his death. Victor Lodge also paid to the appellant assessments against Cressey's certificate, made in July and August, 1888.

Why these sick benefits and assessments were paid by Victor Lodge is not shown in the record, but the presumption would be that it was under a legal liability to Cressey

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to do so under its by-laws, because he was sick and entitled to benefit, and not because of "voluntary kindness" on the part of the lodge, as suggested by appellant's counsel. The legal liability becomes clear as the basis of these payments when we read. Art. 12, Sec. 1, entitled "Benefits" which provides:

"Any member of the lodge entitled to benefits by the provisions of the by-laws of the lodge, who through sickness or other disability is unable to follow his usual business or some other occupation, shall be considered a beneficiary member, entitled to receive such weekly benefits as the by-laws prescribe; * * * nor can a brother while receiving benefits from the lodge become in arrears so as to debar him from them, the master workman being authorized to pay the financier from the amount drawn for his weekly benefits, a sum sufficient to prevent his becoming in arrears to the lodge to the amount of three months' dues."

Under this article, Victor Lodge could provide for sick benefits as it saw fit, and, in addition to retaining out of sick benefits three months' dues, it may have provided for retaining assessments; at any rate the subject was within its sole control and the payment of assessments for Cressey while he was receiving sick benefits, loses its suggested charitable character and takes on a legal liability, in the light of appellant's requirement that dues for three months should be taken out of the weekly benefit due to the sick member.

In view of this, it is more than likely that from the sick benefits were deducted assessments which, but for such charges, should have been sent entire to Cressey. And such deductions were made, and said payments of assessments to the appellant were all made, because of the fact that Cressey was a member in good standing until his death.

The failure to challenge his reinstatement while Cressey was alive, and the payment of sick benefits to him, were all sufficient to preclude Cressey having a thought that he was not duly reinstated and entitled to all the benefits of his order. He died in that belief. There was injury enough in leading him in his lifetime to believe he was in good

standing to estop appellant from now insisting to the contrary.

"The principles of estoppel would not permit appellee to throw appellant off his guard, and thus obtain an inequitable advantage by agreeing to extend the time for appellant to perform the contract and then insist on it as it was written." Per Mr. Justice Walker, in *Longfellow v. Moore*, 102 Ill. 289.

Every word of that language (reversing the designation of the parties) is applicable to this case, as I have above attempted to show.

Resting appellee's case on the facts above discussed, which so clearly sustain the judgment, it is unnecessary to prolong this argument upon the facts.

I will refer briefly to the authorities cited by appellant which are claimed to militate against appellee's position and also ask the court to consider a few, which are cited below, to sustain the appellee's view of the law.

As disposing of appellant's contention that Elmslie's advancing the money as a loan to Cressey to secure his reinstatement was not a payment by Cressey, we cite *Benevolent Society v. Baldwin*, 86 Ill. 479.

In that case the local agent of the society attempted, as a matter of charity, to raise sufficient money among Baldwin's friends to secure his reinstatement by the time fixed by the secretary. He failed in this, but at a later date collected the money in the manner stated and remitted it, but it was refused and returned. Baldwin having thereafter died, it was, on behalf of his widow, claimed that the forfeiture had been waived by the society. The court held otherwise on the facts, and *arguendo* per Mr. Chief Justice Scholfeld, page 485, said:

"It is plain that, in making the effort to collect this money from Baldwin's friends, the local agent, Barnett, was not acting on behalf of appellant, but on his individual account, endeavoring, as a matter of charity, to render a service to Baldwin. To say that the money thus raised and advanced was raised and advanced by Baldwin, is to disre-

gard the facts. It was raised and advanced by his friends, upon the condition that it could be made available to reinstate Baldwin; and the condition being impossible, it was returned to those who advanced it. Baldwin did nothing and assumed no legal liability in the matter."

In the case at bar Cressey assumed a legal liability by requesting the payment to be made on his behalf by Elmslie and by expressly promising to repay him.

That a waiver can be made by a company, an agent, a dependent society or a subordinate lodge, in spite of the most positive terms in the policy or rules declaring a forfeiture but for such waiver, has been so often decided that it has become elementary.

An unconditional assessment after a default for non-payment of the previous assessment has been many times held to be an absolute waiver of the forfeiture incurred prior to such late assessments. 11 Eng. & Am. Ency. Law, 336; Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234; Rice v. New England Mutual Aid Society (Mass.), N. E. 624; Stylow v. Wisconsin Odd Fellows, 69 Wis. 224.

MR. JUSTICE WATERMAN. This was an action of assumpsit to recover the amount of a beneficiary certificate, issued by appellant to one Orson F. Cressey.

The by-laws provided that, by the fact of non-payment of an assessment, a member should stand suspended. Cressey failed to pay assessments and thereby stood suspended. He went to California, and from that place applied for reinstatement. Whether he then stood properly and lawfully suspended, we do not think it necessary now to discuss. By his application for reinstatement, he conceded that such was his position, and as his assessments had not then been paid up, and he then offered to pay them, it is manifest he must have had notice that he was delinquent as to them.

The by-laws as to the reinstatement were as follows:

"Sec. 10. Any beneficiary certificate suspended by reason of non-payment of assessments thereon, may be renewed, if the member be living, at any time within a period

of three months from the date of said suspension, upon the following conditions, and none other; that is to say :

1. All assessments that have been made during the time of suspension shall be paid, including the pending assessments.

2. After thirty days, a certificate of good health shall be furnished by the applicant for reinstatement at the time the assessments are paid, in the manner and upon the blank appended to this section.

3. The financier shall report the same to the lodge at its next regular meeting; a vote of the lodge shall be taken, and if a majority of the votes cast be in favor of reinstatement, the member shall be reinstated. When all these conditions have been complied with, the beneficiary certificate shall be held as renewed and in full force, and not before, and the record of the reinstatement shall be made upon the minutes of the lodge at its next meeting."

Cressey wrote about June 20, 1888, to a fellow-member of his lodge, one Elmslie, expressing his desire to be reinstated, and stated in his letter that he was feeling first-rate since he went to San Diego, California, and never felt better in his life.

Elmslie thereupon signed Cressey's name to the following certificate of good health :

CERTIFICATE.

To the Grand Lodge of Illinois, A. O. U. W.:

JUNE 27, 1888.

I, O. F. Cressey, to whom beneficiary certificate No.— was issued in Victor Lodge, No. 311, A. O. U. W., of the State of Illinois, having been suspended from all the rights, benefits and privileges of the order, and having forfeited all my rights as a member of the order by reason of the non-payment of assessment No. 154, which suspension and forfeiture occurred within a period of three months prior to the date of this certificate, and desiring to be reinstated in said order, as provided by the laws thereof, do hereby certify that I am at this date in sound bodily health, and that

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I agree that the reinstatement of myself as a member of the order, based upon this certificate, shall be valid and binding only upon the condition that the statement herein contained relating to my bodily health, is true in every respect, upon the day and date recorded on this certificate.

O. F. CRESSEY.

Thereupon Cressey was reinstated, paying up his back assessments; thereafter his lodge paid his assessments for him, to the Grand Lodge.

Cressey died at San Diego, August 30, 1888.

Upon the trial it appeared that in July, 1888, he was examined at San Diego, by a physician, who testified that he found his lungs in bad condition with quick consumption; that he was then in the last stage of consumption.

As soon as the Grand Lodge received notice of the death of Cressey, it instructed the lodge of which he had been a member to set aside the reinstatement and to refund the money that had been paid for him, which was done.

Upon the trial, the court gave to the jury the following instructions:

“If the jury believe from the evidence that Orson F. Cressey, deceased, was sick at the time the application for his restoration to Victor Lodge, No. 311, of the Ancient Order of United Workmen, was signed, still, if the jury further believe from the evidence that said lodge soon thereafter had notice of the deceased's sickness, and sent him money, known as sick benefits, then the jury are instructed that defendant waived any and all right to question the validity of such restoration on the ground that deceased was sick at the time said application was made for such restoration.

If the jury believe from the evidence that Orson F. Cressey, deceased, was in his lifetime a member of Victor Lodge, No. 311, of the Ancient Order of United Workmen, and was, in the month of April, A. D. 1888, suspended therefrom, and that afterward, in the month of June, A. D. 1888, was restored to membership in said lodge, on the application made by one Elmslie, and from the time of such

restoration until his death was recognized as a member of said lodge, in good standing, and if the jury further believe from the evidence that after such restoration the said lodge paid to, or on behalf of said Cressey, sick benefits, and afterward and after the death of said Cressey, instructed the Point Loma Lodge in San Diego to bury said Cressey, and send bill therefor to said Victor Lodge, then the court instructs the jury that the defendant waived any irregularity or defect, if the jury believe from the evidence there was any irregularity or defect in the proceedings to restore said Cressey to membership of said Victor Lodge, and that the defendant is estopped from questioning the validity of such restoration, and plaintiff is entitled to recover in this action."

These instructions took from the jury the question of whether the certificate of good health, upon which Cressey obtained his reinstatement, was true.

There was no evidence that the lodge knew that he was then sick, and it appears that it acted upon such certificate; if this was false and fraudulent, as the evidence tended to show, the lodge properly set aside the order of reinstatement. There was no evidence that the Grand Lodge ever, until it received the notice of death, had any reason for believing that the certificate upon which Cressey had been reinstated was false; and whatever knowledge the subordinate lodge may have had of his subsequent illness, its action in paying his assessments for him, or allowing to him sick benefits, can not conclude the Grand Lodge, or make valid a reinstatement obtained by false representations.

The contract of insurance is essentially one of good faith. A reinstatement obtained upon false and fraudulent representations will not be binding upon the insurer. *Supreme Council of the Royal Arcanum v. Lund*, 25 Ill. App. 492; *Connecticut Life Ins. Co. v. Rogers*, 119 Ill. 474.

The judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

THE NORTHWESTERN BREWING COMPANY
V.
JOHN MANION.

Landlord and Tenant—Recovery of Rent—Judgment—Form of.

1. Where the defendant in an action of debt for rent pleads *nil debet*, and the plaintiff joins issue, and it is overcome by a production of the lease and testimony as to the rent unpaid thereon, no further proof upon the issue thus made is necessary.

2. It is too late to raise for the first time in this court a matter—such as a double reply—by which the party complaining is deprived of no substantial right.

3. The judgment in the case presented being for a sum equal to the entire amount that would accrue to the end of the term; to be discharged upon payment of the rent found due up to the bringing of the present suit, together with interest, this court holds that the same is erroneous, and that it should have been, that the plaintiff have and recover his debt to the amount of the accrued rent, and his damages, the amount of the interest thereon, and his costs and charges.

[Opinion filed January 27, 1893.]

APPEAL from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding.

This was an action of debt brought for rent accrued upon a lease executed by appellee to appellant.

Appellant pleaded *nil debet* and six other pleas, one of which was *non est factum*, duly verified.

Upon the plea of *nil debet*, appellee joined issue; to the remaining six he filed replications, setting up in evidence that the matters and things therein alleged, had, in a former suit between these parties, been adjudged and determined contrary to the allegations of said pleas. To these appellant rejoined, denying the said recovery.

A jury being waived, the court found the issues for the plaintiff, as follows: "That the defendant owes and is indebted to the plaintiff in the sum of \$21,280, and assesses

the plaintiff's damages at the sum of \$2,550; thereon judgment was entered as follows: "That the plaintiff do have and recover of and from the defendant his said debt of \$21,280, also his said damages of \$2,550, in form as aforesaid by the court found due and assessed, together with his costs and charges."

"It is further ordered that said debt be discharged upon the payment of the damages, interest thereon, and costs of suit."

The record of the former trial, in which the judgment pleaded was rendered, was introduced, as also the lease made by appellee to appellant.

Messrs. KNIGHT & BROWN, for appellant.

Mr. NELSON MONROE, for appellee.

MR. JUSTICE WATERMAN. Issue having been joined upon the case of *nil debet*, and it having been overcome by a production of the lease and testimony as to the rent unpaid thereon, no further proof upon the issue thus made was necessary. Counsel for appellant are mistaken in saying that the plea of *nil debet* was only met by the replication of *res judicata*. The fact that replication included the plea of *nil debet* as well as six other pleas, might have been taken advantage of by appellant had he moved to strike out either the replication joining issue, or that of *res judicata*; double replies not being permissible save under leave. Appellant failed to object to the double reply, and it is now too late for him to call attention to a matter by which he was deprived of no substantial right.

Appellant was not deprived of an opportunity to make any defense which he had.

At the conclusion of the evidence the following colloquy occurred:

THE COURT: "So far as the case is before the court now, the contention of the defendant is purely technical in the pleadings. There is no showing or intimation to the court

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here that there is any defense. * * * It is the object of courts * * * to do justice between the parties, and when the court tries a case, it should find out what the merits of it are. So far as this case has been before this court, there is not any defense except what has been interposed before, because if there was, it should in all fairness be brought forward; and if the pleadings are not in shape so that they can be put in, the court will put them in shape so they can be put in; * * * and if there is anything which these defendants are in all fairness entitled to interpose here, I will find out a way to let it in. If they have paid anything let them show it. If there is anything in the shape of any eviction, which they did not set up before, or which they did not know of, or which they thought they could not avail themselves of, I will let it in."

By MR. MONROE (counsel for appellee): "If they want to introduce evidence of payment the plaintiff is willing they should do so now."

After a further and quite extended colloquy between the court and counsel for appellant, the following occurs:

THE COURT (to counsel for appellant): "Do you want to put in any evidence?"

MR. KNIGHT (counsel for appellant): "We stand here and the court can do anything it sees fit."

THE COURT: "I have overruled the motion."

MR. KNIGHT: "We have no evidence to offer."

The lease upon which this suit was brought has not yet expired; rent is yet accruing thereon.

The judgment entered in this case is in form for a sum equal to the entire amount of rent that would accrue to the end of the term, to be discharged upon payment of the rent found due up to the beginning of the present suit, together with interest found to have been earned thereon.

It is questionable if, upon an action for rent accrued subsequent to the bringing of the present suit, a discharge of the present judgment, being for the entire sum that could accrue to the end of the term, might not be well pleaded. The judgment should have been that the said plaintiff have

and recover of and from the said defendant his said debt to (amount of accrued rent), and also his said damages (amount of interest thereon) by the court aforesaid, in form aforesaid found, and also his costs and charges, etc. Yates' Pleadings, 524.

The finding should have been entered that the court found the issues for the plaintiff, and that the defendant owes to the plaintiff the sum of (amount of accrued rent), his debt, and also the sum of (amount of interest thereon), the said plaintiff's damages assessed for the detention of his said debt, being in all, the sum of (total amount.)

The finding and judgment have been entered as if this were an action upon a penal bond.

The trial and finding below having been by the court, the judgment of the Circuit Court will be set aside, and a judgment will be here entered for the rent accrued up to the time of the bringing of this suit, with interest thereon to the present time.

NELSON MORRIS

V.

PIERRE WIBAUX.

Sales—Cattle—Warranty—Breach—Interest.

1. Contracts should receive a reasonable construction. They should be given effect to in accordance with the manifest intention of the parties.

2. A purchaser of cattle can not insist that the obligation to receive the same was limited in a given case to the number estimated in the contract of sale "at about" a certain number of head, "more or less," the same providing for the sale of "all of his steers" and "all of his dry cows," of general description and particular location, nor that no recovery can be had on such contract because some of the cattle did not meet the requirements of the contract.

3. The action in the case presented being for cattle sold and delivered, and for breach of contract—a failure to receive cattle, for the breach of the contract the burden of proof was upon plaintiff, the seller thereof;

47	630
54	288
54	469
47	630
58	525
47	630
159	627
47	630
66	650
47	630
64	116

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but as to the cattle sold and delivered, the defendant, the purchaser, seeking to recoup damages because of a breach of warranty, the burden of proof was upon him as to such breach and as to any damages.

4. Plaintiff was entitled to interest at the rate of ten per cent under the statute of Montana on the price of the accepted cattle not paid for, but for which, under the contract, the plaintiff was entitled to payment when delivered.

[Opinion filed January 30, 1893.]

APPEAL from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding.

MESSRS. MORAN, KRAUS, MAYER & STEIN, for appellant.

MESSRS. FLOWER, SMITH & MESGRAVE, for appellee.

MR. JUSTICE SHEPARD. The contract between the parties, upon which the appellee, as plaintiff, brought suit against the appellant, is as follows:

“ This agreement, made and entered into this twenty-first day of June, A. D. 1890, by and between Pierre Wibaux, of Mingusville, in the County of Dawson and State of Montana, party of the first part, and Nelson Morris, of Chicago, in the County of Cook and State of Illinois, party of the second part, witnesseth:

That said party of the first part hereby sells and agrees to deliver unto party of the second part, all of his steers from three years old and up, now on his range between the little Missouri and the Yellowstone rivers, estimated at about thirty-five hundred head, more or less, branded and marked W (W bar) on the right side and on both sides; also all of the steers from three years old and up to be delivered by the Green Mountain Stock Ranching Company, under their contract with said Pierre Wibaux, known as the -U- (FUF) brand; and also all of the four year old steers and up, to be delivered by the Powder River Cattle Company, under their contract with said Pierre Wibaux, known as the 76 brand; said steers as above enumerated to be good mer-

chantable cattle, with no stags, cripples or big jaws among them.

And in addition to the above-described steers said party of the first part also hereby agrees to sell and deliver to party of the second part all of his dry cows now on his range above mentioned, and also all the dry cows to be delivered under contract with said Pierre Wibaux by the Green Mountain Stock Ranching Company and the Powder River Cattle Company, all of said cows to be from two years old and up, branded and marked as above-mentioned steers.

The total number of said dry cows estimated at about 3,000 head, more or less.

For and in consideration of the above sale said party of the second part has purchased, and agrees to receive said cattle and pay therefor, as follows: For the steers, as above described, at the price of forty-five dollars (\$45) per head; and for the dry cows, as above described, at the price of twenty dollars (\$20) per head; the sum of twenty-five thousand dollars (\$25,000) to be paid at the execution of this contract, the receipt of which is hereby acknowledged, and the balance on delivery of said cattle on the cars at Mingusville, on the Northern Pacific Railroad, at any time between the 20th day of July and the 10th day of November, 1890. Party of the second part to receive from party of the first part a clear and good bill of sale of said cattle, on the completion of delivery and payment of same.

In witness whereof, the parties to this agreement have hereunto set their hands and seals this 21st day of June. A. D. 1890.

Witnesses :
DAVID TUCKHORN.
WILLIAM COURTENAY.

PIERRE WIBAUX. [Seal.]
NELSON MORRIS. [Seal.]

I. MEYER, agent."

It will be observed that the cattle were to be delivered on board the cars at Mingusville; that all steers were to be good merchantable cattle, with no stags, cripples, or big jaws among them, and were to be three or four years old

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and upward, according to their particular brands; and that all the cows were to be two years old and upward, and "dry," and that \$25,000 was to be paid as an advance on the contract. It appears in evidence that the amount of this advance payment was arrived at, and paid, at the rate of five dollars a head on the estimated number of steers, 3,500; and two dollars and fifty cents a head on the estimated number of cows, 3,000; and that, as the cattle were delivered and paid for, a credit, or deduction at those rates, was allowed on each head delivered.

Deliveries were begun, under the contract, in the month of July, and continued from time to time during the month of August, so that, prior to September 5, 1890, appellee had delivered, and appellant had received and paid for, 1,293 steers and 3,232 cows. Upon September 5th, 6th, and 7th, appellee delivered to appellant 1,072 steers and 370 cows; these cattle were received by the appellant, shipped to Chicago, and have not been paid for.

On September 9, 1890, appellant notified appellee that he, appellant, would receive no more cattle.

The action is to recover, first, the contract price for the 1,072 steers and 370 cows delivered at the September delivery, and not paid for; second, to recover damages claimed to have been sustained by appellee by reason of appellant's refusal to receive 1,180 steers and 1,127 cows which appellee claims to have had on hand on September 9, 1890, and which he claims appellant ought to have received under the contract. Of these cattle which appellant refused to receive, appellee claims to have resold, between September 9th and November 10th, 708 steers and 762 cows; the balance, viz., 412 steers and 305 cows, he claims to have had on hand on November 10, 1890.

The cause was tried before the court without a jury, and judgment rendered for plaintiff in the sum of \$54,515.90. According to the findings of the judge as set forth in the abstract of record, this amount was reached by charging appellant with \$45,435, balance claimed for the cattle delivered at the September deliveries, and with \$9,532.75, loss on

708 steers and 762 cows shipped and sold by appellee after appellant's refusal to receive further cattle, and with \$5,801.56, difference between contract price and market value of 412 steers and 365 cows held on hand November 10th, and allowing appellant a reduction of \$6,253.41, by reason of certain of the cattle delivered, certain of the cattle shipped by appellee, and certain of the cattle on hand on November 10th, failing to comply with the contract.

In addition to the special counts upon the contract, there were also filed the common counts, including one for cattle bargained and sold; and the pleas were non-assumpsit and set-off.

The first delivery of cattle seems to have been accepted as satisfactory, and all the cattle delivered prior to September 5, 1890, consisting of 1,293 steers and 3,232 cows, were paid for. The appellant had his agent at Mingusville, on the Northern Pacific Railroad, to inspect the cattle and receive or reject them, as they were tendered by appellee.

Commencing with the second delivery, objections began to be interposed by the agent, on the ground that the cattle tendered did not meet the requirements of the contract, but rejecting some, the main bulk of the cattle delivered prior to September 5th were accepted and shipped to Chicago, either with or without protest, by the agent, and were paid for, as aforesaid.

It is conceded that the market price for cattle of the kind contemplated by the contract suffered a very marked decline after the time of the making of the contract.

The disputes finally culminated on the 9th of September, when appellant refused to receive any more cattle. Prior to this refusal to receive any more cattle, the appellant, by his agent, had received in the month of September, 1,072 steers and 370 cows, which were not paid for.

Deducting from the contract price of these cattle delivered in September, the advance payment per head made thereon, and on other cattle left in the hands of appellee, there remained a balance of \$45,435 due appellee, according to the contract.

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On certain other cattle, which appellee had at Mingusville, ready for delivery on September 9th, and which because they were refused acceptance by appellant, the appellee shipped to Chicago and sold at a loss from the contract price, the court below allowed appellee \$9,532.75. And on still other cattle which the appellee had on hand on September 9th, and which he claimed were eligible under the contract, but which appellant would not receive, the court below allowed to appellee the difference between their then value and the contract price, amounting to \$5,801.56.

The court below allowed to the appellant a credit against these various claims by the appellee of \$6,253.41, made up of allowances for the difference in value between "dry" cows as contemplated by the contract, and a certain number of cows which, on reaching Chicago, were found not to be "dry," and for certain ineligible steers which were included in those of the September delivery, and for those not delivered but shipped and sold by appellee.

The questions of fact contested between the parties were mainly as to whether the cattle delivered in September, and those on hand ready to be delivered, were up to the contract requirements, and therefore whether appellant was bound to pay for them; and also as to whether the cattle which were delivered prior to September 5th, and paid for, were up to said requirements. It was claimed by appellant that these last mentioned cattle which were paid for by him, were not up to the requirements of the contract, and their deficiency in that regard was made the subject of set-off and recoupment. The allowance or credit to appellant made by the court, already referred to, was in furtherance of this claim by appellant to the extent that the evidence, in his judgment, warranted.

The evidence disclosed that a considerable number of both steers and cows that were delivered were under the age specified in the contract, but the court below refused to allow appellant a credit therefor because there was no evidence as to the value of such as were under age, and held that the burden of proof was upon the appellee to show their differ-

ence in value from those of the required age, if any there was.

It would too severely tax the limits of an opinion to review the evidence, the abstract of which occupies the most of a volume exceeding seven hundred pages, filed in this court.

From so careful an inspection of the evidence as the importance of the interests involved demands, we are, however, satisfied that the learned judge of the Superior Court before whom the case was tried, came to the correct conclusion as to the controlling facts of the case.

The contention that the obligation of appellant to receive cattle under the contract was limited to the number of cattle estimated "at about thirty-five hundred head (of steers), more or less," and "three thousand head (of cows), more or less," is without merit. Except for the purpose of determining the amount of the advance payment, the expression of the number of head appears to serve no special purpose in the contract. The contract was for "all of his steers," and "all of his dry cows," of general description and particular location.

And the same conclusion might be stated concerning the contention of appellant that the contract was inseverable, and that because some of the cattle were found not to meet the requirements of the contract, therefore no recovery could be had under the contract.

Contracts should receive a reasonable construction. They should be given effect to in accordance with the manifest intention of the parties.

Here was a contract for the sale of a vast number of cattle, herded upon a range containing about 5,000 square miles, and mingled with other cattle of different grades and ages.

It could scarcely have been in the contemplation of the parties to the contract that some cattle varying in age and quality from the specifications of the contract should not become mixed in with the numerous deliveries. Under such circumstances nothing more than restitution might properly be demanded and that was allowed.

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Upon the further contention that as to such cattle as were delivered and did not fulfill the requirements of the contract as to age or as to their quality in other respects, it devolved upon appellee to show their value, we think counsel for appellant misconceive the law. And in the same connection may be considered the further contention by appellant that the burden was upon appellee to show that the cattle delivered in September and not paid for, were of the kind and description called for by the contract, and that appellant was not liable to appellee in damages by reason of appellant's refusal to receive further cattle.

The question is one of law as to upon whom the burden of proof rested.

The action was two-fold: for cattle sold and delivered, and for breach of contract, viz., for a failure to receive cattle.

For the breach of contract the burden was upon the party alleging it, to wit, upon the appellee, and the court below properly so held, and the evidence was sufficient. But as to the cattle sold and delivered, the appellant sought to recoup damages because of a breach of warranty, and the burden was upon him alleging it, to wit, upon the appellant.

The delivery and acceptance of the cattle were shown, and if there was a warranty of them, it was immaterial whether they were received under protest or not, for it is not contended that their acceptance extended so far as to amount to an express waiver of the warranty.

The breach of warranty upon which the right of appellant by way of set-off or recoupment depended, constituted an affirmative defense and must have been made out by a preponderance of evidence.

Assuming that the contract contained a warranty that the steers should be good merchantable cattle, and that both they and the cows should not be under the specified ages, and that the warranty was not waived by the acceptance of the cattle, but survived their acceptance, then, as held in *Underwood v. Wolf*, 131 Ill. 425, the appellant relying upon a breach of the warranty as a defense, or by way of set-

off, the burden of proof was upon him as to such breach, and as to any damages; and unless he proved such breach and damages by a preponderance of the evidence, he is not entitled to any benefit therefrom.

We might multiply authorities and extend our discussion of this branch of the case, but doing so would add nothing to the certainty of our conclusion.

There are other questions in the case, but it is enough to say that, while there may be minor and technical errors, we think that upon the whole record the appellant has suffered no substantial injustice, except in the matter next mentioned.

Appellee concedes that the Superior Court judge committed an error by way of oversight, in not allowing to appellant the cost of transporting from Mingusville to Chicago, the 259 delivered steers found by him not to fulfill the requirements of the contract, and offers to remit the amount thereof, \$1,530.69, from the judgment below, in case we do not, by a final judgment here, allow him the benefit of his cross-errors.

As to the cross-errors assigned by the appellee, we do not understand them to be seriously insisted upon, and do not regard them as important, except as to the refusal of the court to allow interest at the rate of ten per centum under the statute of Montana for the price of the accepted cattle, not paid for, but to which, under the contract, the appellee was entitled to payment when delivered.

By an additional count filed to the declaration, while the cause was on trial, the appellee specially declared upon the Montana statute for interest, and we are unable to see why he was not entitled to recover interest.

The contract was to be performed in Montana; the money was to be paid there on delivery of the cattle there on board the cars; the number of the cattle delivered was an ascertained quantity, and the price per head fixed, and the amount due, a determined sum, and the contract was in writing.

We fail to see why there was not from the time of the delivery a certain sum of money due upon the contract.

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The statute of Montana offered in evidence, provides as follows:

“A creditor shall be allowed to collect and receive interest when there is no agreement as to the rate thereof, at the rate of ten per cent per annum, for all moneys after they become due on any bond, bill, promissory note or other instrument of writing,” on judgments, on money due on settlement of accounts, and on “money withheld by an unreasonable and vexatious delay.”

The statute of Montana is not unlike, in effect, to the interest statute of Illinois, and it would seem as if what was held in the following cases, is applicable: *Heiman v. Schroeder*, 74 Ill. 158; *Downey v. O'Donnell*, 92 Ill. 559; *United Workmen v. Zuhlke*, 129 Ill. 298 (and cases there cited); *Heissler v. Stose*, 131 Ill. 393; *Whittaker v. Crow*, 132 Ill. 627.

See, also, the holding of the Supreme Court of Montana in *Randall v. Am. F. Ins. Co.*, Montana, 340.

It is apparent that if interest should be allowed, as claimed, the amount thereof would exceed, by a considerable sum, the error in not allowing the cost of transporting the 259 steers to Chicago.

We ought, if possible, to avoid a reversal and remanding of the cause, and the delay and great expense of another protracted trial below, because we think substantial justice will be best advanced by so doing.

We will, therefore, give to the appellee the option, to be exercised within ten days, of an affirmance of the judgment as it stands, or of an affirmance of the residue after remitting the sum of \$1,530.69, or of a new judgment, based on a finding of facts here, for a sum made up by remitting the sum of \$1,530.69 from the price of cattle received and not paid for, and adding interest on the residue of that price at the Montana rate to the present time.

CHICAGO PACKING & PROVISION COMPANY

V.

MICHAEL H. ROHAN.

Master and Servant—Negligence of Master—Injury to Servant—Packing Houses—Ordinance of the City of Chicago as to Safeguards—Assumption of Risk.

1. The ordinance of the city of Chicago touching “proper safeguards” for vats containing hot liquid, means proper safeguards with reference to the work to be done; one which, while affording reasonable security, does not unreasonably interfere with the work which must be performed.

2. Only an expert in a given business can tell whether a railing around a given vat was a proper safeguard.

3. It was error in the case presented, to leave the jury, by the instruction, free to say as to whether the railing in question was a “proper safeguard,” no evidence having been introduced on this point.

4. A person can not recover for an injury arising from improper safeguards, where he continues at work with knowledge thereof, without complaint.

5. In the case presented, this court holds that the judgment for the plaintiff can not stand, upon the ground that the plaintiff, when injured, was not in the exercise of ordinary care.

[Opinion filed January 30, 1893.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Appellee, while working as a steam fitter in the packing house of appellant, walked into a vat of boiling water and was severely injured. He brought suit against appellant and recovered a verdict and judgment for \$12,800.

Appellee narrates the circumstances attending the accident as follows:

“On Monday, October 13, 1890, I was working for the packing company. We had been working on some flanges in the engine room. I went up stairs to collect some tools which I had left over Saturday and when I got in there the

47	640
54	254
47	640
194	1135
194	1126

room was full of steam, there was no light, and I walked into a vat of boiling water. All of my flesh fell off when they took my clothes off.

It is twelve feet from the floor of the press room to the level of the vats. There is a three-board railing protecting the edge of the vats where they come up to the press room. This railing extends around the edge on three sides of the room. There was also, at that time, upon the railing, a trough, which carried the lard out of the kettles opposite the three-board railing. That chute was on the side of the three-board railing next to the vats.

The lard trough, with reference to the railing, was on a level with the railing, on the inside; hanging on the inside. The distance from the railing to the planks is very short; there is nothing to walk upon except some removable planks. The distance from the railing to tank five is about eight feet, but I have never measured it. The depth of vat five at the time of my injury was, I think, four feet six inches. This vat was covered by movable planks that you could pick up and throw aside to skim the vats. Sometimes when they were through the planks were left off. They generally had a light in front of the uncovered vat, but there was no light when I went up.

The vats were covered with removable planks. There was no covering but removable planks. Inside of the railing there was one plank with posts on it to hold it up, to hold up this lard trough; there was cross-beams over the railing to hold it from tipping over; the plank was about nine inches wide; from that to the tank there was nothing but movable planks.

I do not know the exact height of tank five at the time I was injured; I know that it leads into the third floor, where it is filled.

The material was boiled in water in the tank.

The manhole of tank five was right over vat five, about two inches above the level of the top of the vat. I fell into vat five. Our work bench was on the same level with the vats in the next room west. All of the vats from vat three

to vat ten were not on the same level; vat four, the one next to the window and next to the one into which I fell, projects about two feet higher than the one into which I fell.

My position at the time of the accident was with the packing company as a steam fitter. I was supposed to go to any part of the building and do everything that was necessary to be done, like putting in line pipe work for steam or water, all over the house.

The last that I had been working in the vat room was on Saturday. I worked on the pump at the end of those vats—at the end of vat one. The reason I went into the vat room was to get some tools which I had left there on Saturday and had not taken in.

There was no other way of getting into the vat room where the tools were from the engine room.

After entering the door I proceeded east toward tank eight or three.

I came in at that door and walked east toward vat five which was uncovered and full of liquid, and there was so much steam in the room that I could not see. I was coming around to the end of tank one and before I got to my destination I fell into the vat, and was pulled out again and my flesh fell off and I was attended by a doctor. As I walked between vats ten and eleven I kept pretty close to the railing, but there was nothing there to protect me. I fell in vat five next to the railing where the lard ran through.

The only means of natural light in the room was one window and that was covered by a bridge.

The stock yards road runs between this building and the next building. The two buildings are about 100 feet apart. The window was in a dirty condition at that time.

This window was the only means, at that time, of lighting the room from the outside that I know of. There was no manner of artificial light in the room at that time.

(By the court: Was there any light in the room?)

No, sir. The steam from the kettles filled the room and there was no ventilation for it.

I do not remember seeing any planks or three planks nailed together on vat five at that time.

I put the coils on quite a few of the tanks at the bottom; on the bottom of the iron tank. I had to get inside of the tank to do that. I would get inside of the tank to put the coils in. The opening to go through is the door from the vat—slide door from the vat. There is a slide door in each tank from each vat. That may be about two inches higher than the level of the top of the vat. I mean the slide door is about two inches higher than those boards on top of the vat. I had been down in those vats. I have put lines in those vats to keep that stuff from rusting on them, and I have put in perforated steam pipes in the bottom of the vats. I do not know how many I have worked in, I did not keep track. I always went in when I was called upon, and fixed them and walked out again.

I have been in those vats a great many times while I was employed there. As I recollect, at the time of, and immediately prior to, the time of the accident, the vats were covered with removable planks; they slide both ends on the center between each two vats; the one on the center of the vat shoves up and the other one stayed on a piece of 2x4, and when they are covered over they all come level with the top of the vat; come perfectly level when they are shut down. And they are supported on a partition, and on that partition was a little cleat just below the edge of these boards, and these boards were on these cleats, so when they were through and the vats were covered up, it made a level walk. I have not had occasion to move these boards. I never moved them at all. The men working in the room always moved them. I set them back after them. I have seen them put the boards on top of one another, or on top of another vat. The trough for conveying the lard out is four or five feet, as high as the railing. At the time of the accident it was not eighteen inches higher than the railing. It has been the practice in that house, and in any other packing house, for the steam-fitter to go to the different parts of the building. He may be in one place in the morning,

and another place in the afternoon. On the Saturday previous to my being hurt, I worked on that pump in the afternoon.

I was working with Feers, outside of the room, in the forenoon. I was working in the engine-room across the street. Mr. Feers was helping me on that pump Saturday. If there were three windows in the room they were closed with iron shutters. I only knew of one window at the end of the vat room, directly opposite vat four. That would be opposite to the way I was walking ahead of me. I don't know anything about the rules of a tank room. I have seen a vat man at work. I saw them skim them and scrape them and clean them. They skim the lard off the vats. When they skim the lard off, they leave some of the boards that cover the vats on; generally leave two or three on near the railing, and take the others off. Those that he leaves on he kneels on, I suppose. I have seen them skimming at all times of the day. I do not know how often they skim the vats. I suppose they skim them every time they dump the tank in, may be every day, may be once a week, or once in three months.

The vat men generally use their lights when they skim the vats. They generally put them beside them to see whether they are skimming grease or not. I guess they put their lights right beside the open vat to see what they are skimming out; I have seen them do it. I did not see Mr. Burns until he pulled me out of the vat. I did not see where he was. I didn't see O'Donnell either until he helped me out of the vat. Mr. O'Donnell might have been skimming the vat, but I could not see him with steam. I can't swear that he was skimming the vat that I fell into. I didn't see him.

I did not grab O'Donnell just as I went into the vat, I grabbed the fence railing. I don't know where O'Donnell's torch and lantern were at that time. I did not see the torch there at all, and I did not see the lantern at all. I didn't see that either before or after I was injured. I did not have a light with me. I did not carry one at all. We did not have

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one with us. Saturday, when we were working, we had torches that were in the room. When the vats are not in use, when the boards are over them, when they are not being skimmed and the stuff is boiling underneath, there is more or less steam comes out. The steam, I suppose, comes up through the cracks of the boards.

(Ques.) When the vat is being skimmed, Mr. Rohan, isn't there a larger volume of steam than when the boards are over it and it is simply oozing through the cracks?

(Ans.) There is steam in them all of the time. You can't tell. I suppose if a man is there whose business it is to be there, he could tell. I never paid any particular attention to it.

I think the vats are about eight feet high, six or eight feet, that is, from the bottom of the vats to the floor. I guess the three-board railing is about three feet six high. I walked next to the railing that day. I did not have my hand on the railing; there was a trough that prevented it. I could not get my hand on the top of the railing very handy."

Sub-sec. 81, Sec. 63, Art. V, Chap. 24, R. S. (Starr & Curtis), gives the city of Chicago power "to direct the location and regulate the management and *construction* of packing houses, renderies * * * within the city limits and within a radius of one mile without the city limits."

Under authority of this statute the city of Chicago has created the following ordinance:

"Every vat, bin or other structure with molten metals or hot liquids shall be surrounded with proper safeguards for preventing accident or injury to those employed at or near them."

Upon the trial the court, at the instance of the plaintiff, gave to the jury the following instruction:

"If you believe from the evidence that the vat or structure containing the hot liquid, in which the plaintiff fell and was scalded, was not surrounded with safeguards for preventing accident or injury to those employed at or near it at the time when the injury occurred, as provided in the ordinances of the city of Chicago pleaded in the declaration, and

offered and given in evidence in this case; and if you further believe from the evidence that the absence of such safeguards was the direct cause of the injury complained of in this case, and if you further find, from a consideration of all the evidence in the case, that just before and at the time of the accident the plaintiff was exercising reasonable care and caution, under all the circumstances, for his own safety, then the defendant would be liable."

MESSRS. EDWIN WALKER and ARTHUR J. EDDY, and MORAN, KRAUS, MAYER & STEIN, for appellant.

The law is so conclusively settled that a servant assumes all the well known and obvious risks of employment, that we do not believe it will be seriously contended that Rohan could recover at common law.

He was perfectly familiar with the tank room, the construction of the vats, and the uses to which they were put. He had no business upon the vats at the time of the accident. He was not sent there in the performance of any duties; he entered the room of his own free will, and, as he claimed, in search of tools which he had left there the Saturday previous.

The defendant owed him no duty at that time and under the circumstances to have the vats covered or guarded in any manner whatsoever. Neither the defendant nor any of its servants had any reason to expect that Rohan would attempt to cross the vats at the time he did. On the contrary, the vats at that time were in the sole and exclusive charge of the vat men, and the very vat he fell into was being skimmed by the vat man, O'Donnell.

Rohan was at most a mere licensee. If, as he claimed, he left his tools there on Saturday previous, that was his own carelessness, and he had no more right to be in that vat room on the day he was hurt than any other workman in the employment of the defendant, working in some distant part of the building.

There is no negligence, unless there is a duty, and unless the defendant company at the time of the accident owed

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Rohan the duty of guarding and protecting the vat other than it was, it could be guilty of no negligence.

“To constitute negligence there must be some duty owing from the party whose negligence occasions the loss to the party injured.” Deering on Negligence, Sec. 3; Wharton on Negligence, Sec. 3.

“Negligence consists in the commission of some lawful act in a careless manner, or in the omission to perform some legal duty, to the injury of another. It is essential in the latter case to establish that the defendant owed at that time some specific, clear, legal duty to the plaintiff or the party injured.” *Nicholson v. Ry. Co.*, 41 N. Y. 529; *Splittorf v. Stole* (N. Y.), 15 N. E. Rep. 322; *Cusick v. Adams* (N. Y.), 21 N. E. Rep. 673; *Larmore v. Crown Point Iron Co.*, 14 N. E. Rep. 752; *C., R. I. & P. Ry. Co. v. Eininger*, 114 Ill. 79, 84.

The case of *Chicago & Aurora Smelting & Refining Co. v. Collins*, decided by this honorable court at the October term last, opinion filed January 14, 1892, opinion by Gary, J., is directly in point. That was a case where Collins, appellee, had left his lunch-pail in one part of the building, and leaving his work in another part, took, to him, an unknown route in trying to reach his lunch-pail, and stepped into a kettle of molten lead.

This honorable court, in its opinion says:

“The appellee was employed by the corporation, working nights; but his labor did not call him to the immediate vicinity of the kettles, though on the night before his injury he was engaged in wheeling bullion past one of the plants, within forty feet, more or less, of the kettles, and saw men with torches working around the kettles. On the fourth night of his employment he was set at work in a lead-pit, from which access to that plant could be had by going up some steps and stepping over a trench or bin for holding coal, to the floor where the kettles were. He had left his lunch at some other part of the premises, and in the night, wanting it, and having seen others go up those steps, he took that, to him, unknown route, to the place where he had left it. In so doing he walked into the molten lead in the

smallest kettle of the plant, sustaining very severe and probably permanent injury, and suffering prolonged and excruciating pain.

For that injury he sues, grounding his action on a supposed neglect of duty of the appellant to keep premises reasonably safe, or warn employes of the danger.

Many cases on this subject are collected in *Thomp. Neg.* 1244. But the question whether, upon the facts in evidence, there was such a duty, is before us. The appellee was not sent by the appellant to the place where the kettles were, nor put at any work that would take him near them. The most that can be said is, that, being employed in the works, he had an implied license to go, and was not a trespasser in going where his duty did not call him, taking an unknown route on an errand of his own. To such facts the principle and authorities upon which *Gibson v. Sziepienski*, 37 Ill. App. 601, was decided, apply.

The appellant was under no duty to make all parts of the premises safe for a stranger to them to ramble through in the night, even if he was at work for it, in a part where there was no danger.

It is assigned for error that the court refused to instruct the jury to find for the defendant, and also that a new trial was denied.

Both assignments are sustained, the judgment reversed and the cause remanded."

In *Gibson, Parish & Company v. Sziepienski*, Admx., 37 Ill. App. 601, decided by this honorable court, opinion by Waterman, J., the deceased went to the factory where his son worked, to take his son's dinner to him. Entering a passage-way that led to the elevator shaft, he fell down it and was killed. The court say:

"It will be perceived that the declaration first alleges that it was the duty of the defendants to maintain a guard or barrier around the shaft or hole to prevent persons, who might come into the factory with their permission, from falling into said opening. We do not so understand the law.

The rule as stated in *Wharton on Negligence*, Sec. 350,

is: 'If I invite persons into my house for no specific business, and, therefore, as no part of a contract, I say to them, "Take me as you find me. I do not pretend to guarantee anything. If the house is not too old and rickety for me, it is not too old and rickety for you, if I give you *bona fide* what I keep for myself. At all events you can no more complain if you choose to come into my house, on my invitation, that you have to encounter the same risks in it I am accustomed to encounter, than you can complain, if you drop in to dine with me, that I give you potluck."'

Hence, it is properly held that a man does not undertake to make his home safe, so far as concerns mere visitors."

In Shearman & Redfield on Negligence, Sec. 705, the rule is thus stated:

"A mere passive acquiescence on the part of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. They take all risks upon themselves, and have no right to complain of any defect in the premises, even though caused by the direct act of the owner (*e. g.*, a pit sunk in the land), unless the act is malicious, or is committed with notice of the fact that strangers are likely to approach, and without any effort to warn them of the danger, under circumstances which justify a belief that the owner was indifferent to the injuries which might happen to them."

To the same effect are the cases of *Murray et al. v. McLean*, Admr., 57 Ill. 378; *McGill v. Compton*, 66 Ill. 327; *Illinois Central R. R. Co. v. Carraher*, 47 Ill. 333; *Turner v. Klekr*, 27 Ill. App. 391. The declaration does not charge that the deceased was more than a mere licensee in the building by the permission of the defendant.

Most factories have in them dangerous places, and dangerous machinery; as to persons in the building by the mere permission of the proprietors, the law does not impose upon them the duty of guarding such dangerous objects so that visitors shall receive no harm.

In *Trask v. Shotwell et al.* (Minn.), 42 N. W. Rep. 699,

plaintiff, as administrator, brought suit for the death of his intestate, who fell through an unguarded elevator shaft upon the premises of defendant. There was no dispute that the plaintiff, Trask, had business upon the premises of the plaintiff, but not in the immediate vicinity of the elevator. The elevator was a freight elevator solely. Verdict was directed for the defendant, and the Supreme Court, after saying that he entered the apartment where the elevator was, solely of his own motion, concludes by saying:

“Applied to the undisputed facts in this case, we are brought to the conclusion that the trial court did not err in its instructions to the jury. In order to maintain this action, there should have been shown to exist, some obligation or duty toward plaintiff’s intestate, which the defendant had left undischarged or unfulfilled. There could be no fault or negligence, or breach of duty, where there had not been an act or a service which the defendants were bound to perform.”

In *Wright v. Rawson* (Iowa), 3 N. W. Rep. 106, the deceased was a miner, employed in defendant’s mine, and the admitted facts on demurrer were, that the deceased, who was at work in one part of the mine, went into a room where other miners were employed for the purpose of visiting those miners, and not while in the performance of any duty. The declaration charged that the defendant and his superintendent knew that it was the custom of miners in his mine, when not actually engaged in work, to visit each other in their respective rooms, and that with full knowledge of such custom the defendant acquiesced in it, and permitted it. It is also charged that the defendant had negligently permitted the supports of the roof of the room to become weakened, and be in a dangerous condition, which was well known to the defendant, and to his superintendent. While deceased was in the room as above stated, the roof fell in and killed him.

On demurrer the Supreme Court of Iowa held that at the time of the accident the deceased had left his proper place of employment, and sought the dangerous room, not while

in the performance of his duties, but upon an errand of his own, and his administrator therefore could not recover, even though the roof and its supports were in a defective and dangerous condition. See also *Evans v. A. & P. R. R.*, 62 Mo. 49.

Mr. E. F. MASTERSON, for appellee.

A servant, upon entering the employment, takes upon himself the risk of all obvious dangers of the manner of appliances with which he is to perform his duties, and of the place wherein he is to perform his work. But in this case Rohan was not working in the place where he was injured, nor was he using the appliance by which he was injured. He was passing through that room by right of, and through the necessity of, his employment. The manner of his employment and scope of his duties were not such as to bring him within the rule governing servants who are using particular appliances in particular places. He had been in that room several times, but sometimes a whole month would pass by, between times, when the pipes in there would not need repairing, while at other times they would need repairing day after day; and upon such occasions as repair was needed, the steam fitter would go in there. Rohan was a new man in the defendant's employ, having only worked at that place for two weeks before the injury, at Nebraska City one month prior thereto, and for two months, prior to going West, he had worked in the Chicago plant.

No ordinary man could familiarize himself with all the lurking dangers of a large packing plant in two months and two weeks time, with an intervening month spent in a distant city, so as to bring him within the rule by implication.

I challenge the counsel to produce a single precedent where the rule has been held to apply under a state of facts parallel, or anywhere near parallel, with the case at bar.

The defendant was bound to furnish him with a reasonably safe passageway from the door to the tank No. 1 upon

that day, and upon any other day when he, of right, traveled there, but while the defendant was not an insurer against obvious dangers, yet it was its duty to see that no hidden, and, to him, unknown, undiscoverable dangers lay in his path. He did not know, and could not discover the temporary danger occasioned by the vat being open in a dark, steaming room, by exercising reasonable care to do so. Whenever he had noticed the vats in use, the warning lights were lit, and when the vats were not in use, the lights were not lit. When he came in there that day, the lights were not lit, but the vat was open, and thereby the usual order of things was reversed, and a new peril, unknown to him, was brought about, by means of which he was injured.

This conduct can not be excused, nor its results be avoided, by pleading the co-servant rule, for there was not the remotest degree of co-association between appellee and O'Donnell.

This case appears to be exactly parallel with McCormick & Co. v. Burandt, 37 Ill. App. 165, and with most of the cases cited by the learned court in the opinion in that case.

In Buhle v. Harland, 37 Ill. App. 350, Buhle's regular place of employment was upon an elevated platform, which he reached by climbing a rude ladder, "several times a day, for a space of three months or more, and knew," etc. In other words, he was injured in his place of employment, through circumstances with which he was "perfectly familiar" for three months or more. Not so in this case. We are astonished that the learned counsel should attempt to make his opinion, in that case, fit the facts in this, but we do not pretend to know the workings of his mind then or now.

So in Glass v. C., R. I. & P. Ry. Co., 41 Ill. App. 87. The engine upon which Glass slipped, was his implement or tool, with which he ought to be "perfectly familiar." Therefore that opinion does not fit the facts in this case. If Glass had been injured by the faulty construction of the switch post, and had been in the employ of the company but a short time, he would have recovered in his case. And in Abbott

Chicago Packing & Provision Co. v. Rohan.

v. McCadden, 51 N. W. 1079, the facts are in no particular parallel with this case. Besides, in that case, the court does not say that knowing acquiescence in an illegal practice or custom of an employer, affects the employe's right of action, but that it may do so.

In Michall v. Stanley, 23 At. Rep. 1094, it was the regular duty of the boy to work around, and with, the saw by which he was injured, besides, the defective condition of the saw was to him known for some time. This case is not applicable to the case at bar; nor is the case of Yates v. The J. Co., 69 Md. 370; for the opinion itself assumes an opposite state of facts from the findings of the jury in this case. And in Emma C. O. Co. v. Hale, 19 S. W. 600, the law, as laid down in that case, is fatal to the appellant's cause in this, when applied to the facts herein, for the court say: "On the other hand, the employer takes upon himself an implied obligation to provide the person employed with suitable instruments and means with which to do his work, and to provide a suitable place in which such person, when exercising due care himself, can perform it safely, or without exposure to dangers that do not come within the obvious scope of his employment."

The place where Rohan was injured was not "set apart to him by the masters" in which to perform his duties, nor was it in such condition that, by obvious dangers, he was injured while working there as a steam fitter; for whenever he worked there the room was lighted, and dangers there were apparent to him and were avoided by him. He went in there upon a necessary errand, in the service of his master, and was injured by a latent danger, brought about by the master in removing the cover of the vat and leaving the same unlighted, or insufficiently lighted, which, taken together with the master's reckless disregard of the municipal law, and wilful, reckless negligence in constructing the vats, caused his injury.

MR. JUSTICE WATERMAN. Whether this ordinance enters into and forms a part of the contractual relations that exist

between the owners of and the employes working in packing houses, imposing a duty which, if neglected, may serve as the basis of a personal action for negligence, or merely subjects the employer or owner to such penalties as may be provided for its disobedience, is a question which need not now be discussed.

The ordinance does not prescribe any particular safeguard; the language is "proper safeguards." This must mean proper safeguards with reference to the work to be done. A safeguard might easily be made which would render it impossible for any one to be injured at such vat. Such safeguard might, however, absolutely prevent the performance of work designed to be done. The ordinance must be held to mean a practicable safeguard, such as, while affording reasonable security, does not unreasonably interfere with the work which must be performed. No one will contend that the ordinance requires that work about such vats should be made as safe as is skimming milk.

Appellant contends that by placing the railing around these vats it had complied with the ordinance. Only an expert in the business could tell whether this railing was a proper safeguard or all the safeguard that could reasonably be made use of.

As to this matter there was no evidence; yet the jury were, by the instruction of the court, left free to say that this railing was not such "proper safeguard" as the ordinance of the city required—a matter concerning which the jury can not be presumed to have had any knowledge at all.

It is not claimed that if there were no proper safeguards, the plaintiff was ignorant of the fact. He insists that "proper safeguards," such as the ordinance requires, were not provided; that he knew this all the while, yet kept at work without making complaint of the insecure and "unlawful" condition of the works. Manifestly, he can not now recover damages for any injury caused by a neglect to comply with the ordinance. The case of *Wabash, St. Louis & Pacific Ry. Co. v. Thompson*, 15 Ill. App. 117, is in this regard quite similar to the present.

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It is so well settled as to require no citation of authorities, that an employe can not recover for an injury suffered in the course of the business about which he is employed, on account of defective appliances used therein, when such injury was received after he had a knowledge of the defect and continued his work. Upon becoming aware of the defective condition of such appliances, he should desist from his employment; but if he does not do so, and chooses to continue, he is deemed to have assumed the risk of such defect, at least when he has not been induced by his employer to believe a change would be made, and has not plainly objected.

The court, by its instruction, utterly disregarded this well known principle.

Taking the plaintiff's testimony, it appears he had complete knowledge as to the location, construction and mode of operating these vats.

We do not understand that this is disputed. What is contended is, that the plaintiff knew that when the vats were uncovered, it was customary to indicate them by torches and lanterns; that relying upon such custom, he walked into the uncovered vat; that by the absence of torches and lights, a new danger was created, of which he had no knowledge.

The plaintiff's own witness, O'Donnell, testified that at the time of the accident, O'Donnell was skimming the vat; that he had a torch which gave sufficient light for him to work by; that it was the light that had always been used; that his lantern was behind him, and that after the accident he found it in the vault and can not tell whether it was burning at the time the plaintiff fell in or not; that he had a torch and a lantern when he went to work on vat number five.

If it be conceded that there was neither torch nor lantern burning when the plaintiff stepped into the room, the situation then becomes one in which appellee, knowing the dangers of the place, walked into a room dimly lighted by only one dirty window, the steam in the place being such as to

obscure his vision, and then went along in a place where he could not see, and had every reason for knowing that each step was fraught with danger. We do not think that this was doing as an ordinarily prudent man would have done under the same circumstances—in other words, was not an exercise of ordinary care.

The judgment of the Superior Court is reversed and the cause remanded.

Reversed and remanded.

LEWIS LAMBEAU ET AL.

V.

JULIUS LEWINSKI.

Injunctions—Nuisance.

Upon a bill for an injunction to restrain defendants from operating their tannery, located in close proximity to the residence of complainant, on account of odors and other unpleasant features in connection therewith, this court holds, in view of the evidence, that no case was made out for an injunction, or for damages recoverable in equity, and that the decree for the complainant can not stand.

[Opinion filed January 30, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

Messrs. FREEMAN & WALKER, for appellants.

Mr. JESSE COX, for appellee.

MR. JUSTICE SHEPARD. The appellee filed his bill in chancery in the court below, for an injunction against the appellants from operating their tannery, situated on the corner of Elston road and Augusta street, in the city of Chicago, in a manner injurious to the property of appellee, separated

therefrom by an alley sixteen feet in width, and for the recovery of damages because of certain alleged wrongful acts in connection therewith.

The decree of the Circuit Court enjoined the appellants, their agents, etc., from so operating their said tannery as to permit particles removed from skins to escape from said tannery onto the premises of complainant, and from permitting the escape therefrom of disagreeable and offensive odors more than such as are common and necessary to tanneries when the same are carefully operated, and awarded to appellee the sum of \$500 as damages, besides the costs.

The lot owned by appellee is fifty-nine feet wide by one hundred feet deep, and is separated from the tannery by an alley. Upon the lot stand two frame houses, one of which, a one-story cottage facing the alley, contains seven rooms, and is occupied by two families, and the other, facing the street at the front end of the lot, an ordinary tenement structure, contains twenty-two rooms and is occupied by twenty-one persons, including the appellee and his family.

Appellee purchased the property in March, 1886. Its particular surroundings were then substantially the same as now. The general region is that of a narrow strip lying between the Milwaukee division of the Chicago & Northwestern Railroad tracks and the north branch of the Chicago river.

The appellee bought and moved upon the property, in a neighborhood where many extensive business industries were conducted, which, in their nature, and of necessity, were more or less noisome.

It is a fair inference from the use he makes of his property that he was induced to locate there by the prospect of profitable tenants from workmen engaged in the business carried on in the neighborhood.

He is not estopped to complain of nuisances connected with or growing out of the operation of those business establishments, but his complaints should only be such as are reasonable, and consistent with the necessities of the world about him.

At the time complainant purchased these premises and moved into them, the Lambeau tannery was already in operation, and had been for over sixteen years. At the present time the tannery has been located there for more than twenty-two years. The Lambeaus bought it in 1884. They had been formerly conducting a tannery elsewhere and they moved into this tannery immediately after its purchase, in 1884, and have carried on the tanning business there ever since.

It will be seen that when the appellee moved into the premises which he now occupies, the tannery had for many years occupied its present location, and was then conducted in the same manner and by the same parties who are now defendants in this suit, and who still operate this tannery.

About one hundred men are employed in the tannery and about \$100,000 are invested in the works.

The neighborhood is a business neighborhood. Quite a large number of tanneries exist in that vicinity. A coal yard is right across the street on the river bank. The north branch of the river itself is very close to the tannery. Across the street in another direction is the Union tannery. Not far away are other tanneries. A quarter of a mile away are the gas works, concerning the smell from which complaint has been made by people in the neighborhood. It is a business neighborhood much more than a residence neighborhood. There is dock property along the river, a box factory near by, and a railroad runs close to the factory and close to complainant's premises.

There is no contention as to the law of the case, and it would serve no good end to state the legal principles applicable. The question submitted to us is solely one as to whether the facts of the case warrant the decree of the Circuit Court.

To set forth a review of the evidence on both sides, would extend this opinion inordinately, and we will not attempt it. From a careful reading of the material parts, however, and giving proper weight to the testimony of those witnesses whose opportunities appear to have been the best for

Zander v. Feely.

knowing the operation of the tannery, and whether the odors produced thereby and the dust from the skins, were unnecessarily offensive and injurious to the appellee, we are clearly of the opinion that appellee failed to show by the weight of the evidence, that he was entitled to the relief given by the decree of the court below.

The evidence shows to our minds that the tannery is conducted in a skillful manner, and with as little offense and damage to the neighborhood in general, and to the appellee in particular, as is consistent with the nature of the business, and known appliances.

To subject the appellants to the payment of large damages for using their property in a way which, in the nature of things, must be continuing, and will be recurring in a greater or less degree every day the tannery remains in operation, will, necessarily, result in the destruction of appellant's business, an event which should not be encouraged upon any such showing as the evidence in this case discloses.

Whether or not the appellee might maintain an action for tort against appellants because of any special injury to him or his property arising out of particular and isolated facts, disclosed by the evidence, is a question not now to be determined; but we are clear that there has been no case made out for an injunction, or for damages recoverable in equity.

We will therefore reverse the decree of the Circuit Court with directions to dismiss appellee's bill, without prejudice, however, to the right of appellee to sue at law.

Reversed with directions.

EDWARD W. ZANDER

V.

MARY E. FEELY.

Guardian and Ward.

1. A guardian may not use the estate of his ward for his individual profit.

2. A party can not recover upon a contract wherein a guardian who owned a certain interest in land of which his ward was part owner, agreed to institute and carry through court, proceedings necessary to the consummation of an exchange of such property, for property owned by such party, where it appears that the guardian would have derived benefit therefrom, he refusing to fulfill his agreement.

3. Such contract would be void as fraudulent, although the guardian would not be benefited by the carrying through of the same, where he agreed to indemnify the other against having to bid more than a sum named for the minor's interest.

[Opinion filed January 30, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE H. KETTELLE, Judge, presiding.

Mr. GEORGE A. DUPUY, for appellant.

No appearance for appellee.

MR. JUSTICE SHEPARD. The declaration in case, for damages for breach of contract, shows that appellee was the guardian of her brother, John A. Feely, a minor, and that said minor was the owner, in common with appellee and his other brothers and sisters, of certain real estate in Will County, in this State; that appellant was the owner of certain other real estate situated in the city of Chicago; that in April, 1891, upon the request of the appellee, the appellant entered into a contract with the brothers and sisters of said minor, including said appellee, in her own right, for the exchange of said properties, respectively; that the appellee, then and there, as guardian of her said minor brother, undertook and agreed to properly conduct such necessary proceedings in the County Court of Will County as would authorize her, as such guardian, to sell and convey the right, title and interest of said minor, in and to the said real estate in Will County, and undertook and agreed to make such sale at the earliest practicable time after the date of said contract, and to execute such deed as might be authorized by said County Court, and to take all such steps as might

Zander v. Feely.

be necessary to secure a decree authorizing the sale of said real estate, so that the appellant might be enabled to become the owner of the entire title to said Will County property; that the appellee has not filed or caused to be filed any petition for the sale of said minor's interest, nor taken any steps, as provided by her said contract, for the purpose of enabling the said County Court to pass upon the question as to whether it will or not order a sale of said minor's interest, but on the contrary, she refuses so to do, wherefore the appellant has suffered large damages, etc.

To the declaration a general demurrer was interposed and sustained and judgment given against appellant for costs.

It is apparent upon the face of the declaration that the moving consideration to the appellee for the alleged agreement upon her part to secure authority to herself as guardian, to sell the interest of her ward in the Will County real estate, was the benefit which would accrue to herself in the exchange of her individual interest in the same land, by an exchange thereof for the property of appellant. Such a consideration and such an agreement tends to corruption, and, because of such tendency, is against public policy.

The cases of *Mason v. Wait*, 4 Scam. 127, and *Mason v. Caldwell*, 5 Gilman, 196, relied upon by counsel for appellant to sustain his proposition that a guardian may be held personally liable for a refusal to carry out a contract which the guardian has no power to make, are not in point. In those cases there was no intermingling of the guardian's individual interests with those of her ward.

In the case at bar it clearly appears from the declaration that the inducement to effect a disposal of appellee's own interest in the common estate of herself and her ward, lay at the base of her undertaking to procure authority for, and make a sale of the minor's interest.

Such an agreement is void as being opposed to a beneficent public policy, which forbids a guardian to use the ward's estate for the individual profit of the guardian. The appellant is bound to know the law of the State, and he is entitled to no relief under a void contract to which he has made himself a party. He is as culpable as she.

Were we permitted, against the authority of *Hart v. Tolman*, 1 Gilm. 1, to go outside the declaration, and examine the copy of the contract upon which the suit is based, and which is attached to the declaration as an exhibit, for the purpose of ascertaining the character of that instrument and the extent of the obligation undertaken by the appellee, we would there discover that she had expressly agreed to indemnify the appellant against his having to bid more than \$3,000 for the minor's interest, a proceeding so fraudulent in law, and one to which appellant himself was a party, as to render the contract void for that reason, even though the guardian, appellee, was not individually profiting by the bargain.

The judgment of the Superior Court will be affirmed.

Judgment affirmed.

47	662
154s	95
47	662
84	167

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY ET AL.

V.

ROSA RED, ADMINISTRATRIX.

Railroads—Negligence—Personal Injuries—Crossings—Contributory Negligence.

1. The protection and shield of the law extends to those ignorant of its provisions as much as to those most learned in it.

2. What constitutes due care, ordinary care, diligence or negligence depends very largely upon the circumstances of each particular case.

3. Railroad companies may be presumed to know the condition of the crossings over which they run their trains, and if they see fit to operate them in cities at places where the statutory obligation to have the public right of way safe, has been neglected, they must at least be held bound to exercise such diligence as the safety of persons at the unsafe public way demands.

4. In an action against a railroad to recover for the death of a person named, this court holds that the evidence justified the finding that but for the negligent failure of such company to keep the crossing where the accident occurred, safe, as required by the statute, such accident would not have occurred, and that deceased was killed by a train operated by a certain road.

[Opinion filed January 30, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. G. W. KRETZINGER, for appellant.

Mr. B. M. SHAFFNER, for appellee.

MR. JUSTICE WATERMAN. This was an action brought to recover damages occasioned by the death of John Red, Jr., a boy some ten years of age, who was killed at a grade crossing in Chicago.

It appeared on the trial that the sidewalk on the street crossing over which appellants ran cars, was out of order, and that the deceased, in going over the crossing, stumbled at a hole in the walk, fell in front of an advancing engine and was killed.

It is insisted that the deceased failed to exercise such care for his own safety as could be expected from a person of his years and experience; that he was heedless and reckless, running so close to and in front of an engine that, although it was moving but at the rate of five miles an hour, it was upon him almost as soon as he fell.

We should be inclined to think that there could be no recovery if there were no negligence on the part of appellant, save that of running an engine over this crossing at the rate it did.

The statute makes it the duty of the railroad corporations in this State to construct and maintain all crossings of streets and highways and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property. Hurd's R. S., Ed. of 1891, Sec. 71, page 1087.

John Red, Jr., had, as on this Sunday morning he started to go over this crossing, a right to rely upon a compliance with this law. No doubt he had never heard of it, but the protection and shield of the law extend to those ignorant of its provisions, as much as to those most learned in it. The

maxim "*Ignorantia juris non excusat*," ignorance of the law excuses no one—is more completely expressed in the principle "*Ignorantia juris, quod quisque tenetur scire, neminem excusat*." Ignorance of the law, which every one is presumed to know, excuses no one.

As no one can plead ignorance of the law as an excuse, so ignorance of the law deprives no one of its protection.

This lad may be presumed to have known of the duty of the railroads owning this right of way, in respect to it, and to have run along in reliance upon a discharge of such obligation.

It does appear that in consequence of the neglect to keep this crossing in order, he fell and was killed; it does not appear that had this sidewalk been "safe as to persons and property," he would have been injured.

What constitutes due care, ordinary care, diligence or negligence, depends very largely upon the circumstances of each particular case; most especially must this be borne in mind when considering what judgment and care a boy ten years old is required to exercise. An adult might, from his greater experience, have concluded that there was much doubt about the law as to railroad crossings having been complied with, while a boy would have thought nothing about it.

Appellants do not concede that the deceased was killed at this crossing, or by reason of any negligence upon the part of either of them. As to this, we see no reason for interfering with the conclusion of the jury, affirmed as it was by the judge before whom the case was tried.

The negligence shown on the trial of this cause was primarily a failure to keep this crossing safe for persons and property, as required by the statute; and we think that the jury were warranted in finding that but for such negligence the accident would not have occurred; following this negligence was the running of a train over this crossing located in the midst of a great city, under the condition of the crossing at the time the train was run.

It was shown that this crossing had been out of order for nearly a month. Railroad companies may be presumed to know the condition of the crossings over which they run

Foss v. Cummings.

their trains, and if they see fit to operate them in cities at places where the statutory obligation to have the public right of way safe, has been neglected, they must, at the least, be held bound to exercise such diligence as the safety of persons at the unsafe public way demands. While the testimony is contradictory, we think there was sufficient evidence tending to warrant the jury in concluding that the deceased was killed by a train operated by the Louisville, New Albany & Chicago Ry. Co.

The judgment of the Circuit Court will therefore be affirmed.

Judgment affirmed.

S. D. FOSS ET AL.

V.

R. F. CUMMINGS ET AL.

47 665
149s 353

Contracts—Void as to Public Policy—Corners.

1. A combination to enhance the price of an article of prime necessity, such as wheat, or other articles necessary for food, for purposes of extortion, is against public policy, although there may be no attempt to corner the market.

2. In the case presented, this court holds that the amendment of plaintiffs' pleading has not so changed the nature of the cause that the conclusions arrived at in a former trial are not applicable to the present appeal, in view of the stipulation involved herein.

[Opinion filed January 30, 1893.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding.

Messrs. G. W. & J. T. KRETZINGER, for appellants.

Messrs. H. K. WHEELER, and SMITH, HELMER & MOULTON, for appellees.

MR. JUSTICE WATERMAN. This case has before been presented to this court; the opinion of the court is reported in *Cummings v. Foss*, 40 Ill. App. 523.

The cause having been remanded to the Circuit Court, the following stipulation was entered into:

“It is hereby stipulated by and between the parties, plaintiffs and defendants hereto, that upon the hearing of the above cause either parties to the above entitled suit may read from the transcript of the record, certified to the Appellate Court from the former trial, all or any part of the evidence offered by them or either of them at the former hearing and trial of this cause, before his honor, Judge Tuthill, subject, however, to all objections that may be offered or urged against the admission thereof; said objections to have the same force and effect as if said evidence was newly offered by calling the witnesses upon the stand to testify and to give evidence, and said evidence so admitted by the court as aforesaid shall have the same force and effect as if originally given by the witnesses being called upon the stand.”

The plaintiffs amended their bill of particulars and filed an amended declaration; this having been done, a jury was waived, and the cause submitted to the court for trial; whereupon, the evidence given upon the former trial having been read, the court found the issues and rendered judgment for the defendants.

It is now urged that the case was, upon the second hearing, tried in a manner so variant from the trial in the first, that the issue presented is not the same as that passed upon by this court when the cause was first here.

We fail to see how the amendment of the pleadings and the new bill of particulars have so changed the nature of this cause that the conclusions formerly arrived at are not applicable to the present appeal.

We are yet of the opinion, before expressed, that a combination to enhance the price of an article of prime necessity, such as wheat, or other articles necessary for food, for purposes of extortion, is against public policy, although there may not be an attempt to corner the market.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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ACCOUNT—ACTIONS OF—See APPEAL AND ERROR, 23.

ACCRETION—See FORCIBLE ENTRY AND DETAINER, 4.

ACTIONS—See ADMINISTRATION, 3; APPEAL AND ERROR, 23; CORPORATIONS, 9; LANDLORD AND TENANT, 9; PRINCIPAL AND SURETY, 1.

ADMINISTRATION.

1. Where a claim is presented by a widow against the estate of her deceased husband, and the defense avers that it was in part barred by the statute, *held*, that a ledger entry of a balance due the wife, made by the husband, or by his direction, was, under the circumstances, such an admission that the amount there stated was due and unpaid, as would raise an implied promise to pay such amount and bar the statute. *Coulson v. Hartz*, 20

2. Upon a claim filed against the estate of a widow for a sum received by her from the administrators of her husband's estate, her said husband having left a will wherein she was given the use of his personal property for life, the sum in question being less than she was entitled to as widow's award, and it being argued that, in view of the wording of the receipt given by her, she and her legal representatives were estopped from claiming the money to be her own, this court construes such receipt and holds that the money in question became the sole and exclusive property of said widow, and that claimants failed to show any right thereto. *Ross v. Smith*, 197

3. An action on an administrator's bond is not required to be brought within ten years after the execution of the same, but must be brought within such time after a right of action accrues thereon, which takes place upon a breach of a condition thereof. *Frank v. People*, 248

4. Until a valid order of distribution is made in a given case, the administrator is the trustee of the estate for the benefit of the creditors and heirs, and until an order of distribution is made, no cause of action accrues to the heir. *Id.*, 249

5. No order of record as an approval by the court of a final report having been entered in a given case, the same being approved by the judge by his indorsement thereon, such act does not constitute a final settlement. *Id.*, 249

6. A court has no power to make an order of distribution without notice to the heirs, and an order so made would be null and void. *Id.*, 249

7. Upon a claim filed against the estate of a deceased person, it being contended that a certain amount was due upon a sale of cer-

ADMINISTRATION. *Continued.*

tain real estate, from claimant to deceased in his lifetime, the fact being that all the notes given in connection with such transaction were returned to their maker, and a release of the trust deed they were given to secure duly executed, this court declines, in view of the evidence, no question of law being involved, to interfere with the judgment for the defendant. *Hawley v. Kettlewell*, 468

AFFIDAVITS—See INJUNCTIONS, 2; PARTNERSHIP; STREET RAILWAYS, 11.

AGENCY—See EVIDENCE, 1; GUARANTY, 3; HUSBAND AND WIFE, 1; RAILROADS.

1. A person who undertakes to act for another, may not, in the same matter, act for himself in any way to the disadvantage of his principal, and the profits and gains made by the agent in the execution of his trust, belong to the principal; it matters not whether such profit or advantage be the result of the performance of the duty intrusted to him, the obedience of orders to him given, or the violation thereof. *Fish v. Seeberger*, 580

2. It does not matter that the conduct of the agent may have been in the particular case perfectly fair in intent, and that he may not have contemplated any injury to his principal, but only to do that which he assumed to be perfectly right and proper; the result is the same. *Id.*, 580

3. If the agent, dealing legitimately with the subject-matter of his agency, acquires a profit, the principal may claim the advantage thus obtained, even though the agent may have contributed his own fund or responsibility in producing the result. *Id.*, 580

4. All profits and every advantage beyond lawful compensation made by an agent in the business, or by dealing or speculating with the goods of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal. The law will not permit an agent, without the assent of his principal, to acquire an interest in the subject-matter of the agency, adverse or in opposition to that of his principal. *Id.*, 580

5. In an action brought to recover certain insurance money, claimed to have been received by the defendant, a commission merchant, for the loss on certain butter belonging to plaintiff, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff, *Id.*, 580

APPEAL AND ERROR—See FORMER ADJUDICATION, 1; INJUNCTIONS, 3, 5, 6, 10; INSTRUCTIONS, 11; JUDGMENTS AND DECREES, 2; JURISDICTION, 4, 5, 6; MASTER AND SERVANT, 22; MORTGAGES, 5; NEW TRIAL, 1; PERSONAL INJURIES, 9; PRACTICE, 5; RAILROADS, 25, 44; REPLEVIN, 7.

1. If it does not appear, in a given case, tried before a chancellor, what his ruling was as to the admissibility of certain evidence, it will be presumed that in reaching his conclusions upon the merits, he rejected such testimony as was incompetent. *Keithley v. Wood*, 102

APPEAL AND ERROR. *Continued.*

2. If it appears from the record in a given case that the chancellor received and considered incompetent testimony, this court, sitting in review, will consider all the proofs, and if after rejecting such as should have been ruled out by the court below, there remains sufficient to support the decree and show that it is right, the decree will be affirmed. *Id.*, 102

3. When a defendant offers evidence and proceeds with the case, after the overruling of a motion on his part, made at the close of the plaintiff's evidence, to direct a verdict for the defendant, the propriety of such refusal can not be raised upon appeal. *A., T. & S. F. R. R. Co. v. Alsdurf*, 200

4. Where, in a given case, the evidence is in the form of depositions, the rule fails, that "this court will not disturb the finding of the court below, it having heard the witnesses testify, and observed their demeanor while doing so," questions of fact alone being involved. *Farrin v. Cox*, 273

5. Where the evidence is conflicting, and that produced by the party in whose favor the verdict is rendered, is, when alone considered, sufficient to support a verdict in his favor, this court will not reverse such judgment as not being sustained by the evidence. *St. L., A. & T. H. R. R. Co. v. Winkelmann*, 276

6. This court will not, in the absence of evidence of passion or prejudice, interfere with the verdict of a jury in a given case, the evidence being conflicting and no question of law being involved. *Callicott v. Rowan & Son*, 299

7. The refusal of an instruction is not error where the question involved therein is contained in one given for the same party. *I. C. R. R. Co. v. Axley*, 307

8. This court will not consider an alleged error in the modification of an instruction, the instructions not being incorporated in the abstract. *St. L., A. & T. H. R. R. Co. v. Strotz*, 342

9. The motion to quash the writ of *certiorari*, and the ruling thereon, not being presented by a bill of exceptions in the case presented, this court is precluded from considering the assignment of errors thereon. *City of Belleville v. Stauder*, 376

10. The court did not err in refusing to permit a person named to be recalled to testify, on the day after both sides had closed their evidence and rested, nor in trying the case without a jury by agreement, the fact being that the county judge had been counsel in a case to which one of the defendants was a party, previously tried before a justice. *Rigor v. Simmons*, 428

11. No point can be made as to the sustaining of an objection to a given question, where the same question was thereafter answered in substance without objection. *Mitchell v. Hindman*, 431

12. It was error to proceed with the trial of the case presented—a prosecution by information charging defendants with the sale of intoxicating liquors without a license—the defendants not having been arraigned, arraignment not having been waived, and no plea

APPEAL AND ERROR. *Continued.*

having been entered by them or in their behalf; this error was not cured by the agreement of defendants that "the trial of this cause be submitted to the court without the intervention of a jury." *Miller v. People*, 472

13. It is error in such case to impose a fine upon several defendants jointly, such persons, if proven guilty, being liable under the law to the statutory penalty individually. *Id.*, 472

14. An appeal lies directly in bastardy cases to the Appellate Court from the judgment of a County Court. The Circuit Court has no jurisdiction of an appeal in such case. *Stivers v. People*, 511

15. Appeals not being allowable under the common law, the terms of the statute must be complied with when it is sought to take such step. *Id.*, 511

16. The rule is inflexible that in order to take advantage in an appellate court of any improper ruling of the trial court which does not relate to the pleadings, or appear upon the face of the judgment itself, the improper ruling and exception thereto must be preserved in and by a proper bill of exceptions. *McCormick Harvesting Machine Co. v. Adele*, 542

17. Errors assigned in the case presented, challenging the correctness of the rulings of the trial court in refusing to set aside the verdict of the jury and refusing to grant a new trial, will not be considered, the motion for a new trial set out in a bill of exceptions being followed by the statement in substance that the defendant then and there excepted "to such judgment," it not appearing that any exception was taken to the action of the court overruling the motion for a new trial. *Id.*, 542

18. Assignments of error, not discussed in the argument upon appeal, must be considered waived. *E. St. L. Electric St. Ry. Co. v. Stout*, 546

19. No exceptions being preserved as to instructions, this court will not consider errors assigned thereon. *Id.*, 546

20. In the case presented, the trial having been before a jury, the trial court overruled the motion for a new trial, and rendered a judgment in accordance with the finding of the jury, to which rendition the appellant excepted; no exception having been saved as to the ruling upon such motion, the court holds that the exception assigned can not be considered by it. *Id.*, 546

21. Owing to particular circumstances and hardships, courts sometimes refuse to dismiss appeals from judgments which do not completely dispose of the cases in which they were entered. *Crouch v. First Nat'l Bank*, 574

22. An appeal does not lie from a mere order of reference to a master to take testimony, state an account, and report the same to the court; such order is not a final decree from which an appeal lies. *C. & C. Electric Motor Co. v. Lewis*, 576

23. At law, in an action of account, the order to account is, as in chancery, merely interlocutory, and is not appealable. *Id.*, 576

APPEAL AND ERROR. *Continued.*

24. A decision of this court stands as to a given point, the same not having been disapproved by the Supreme Court upon appeal. *Farwell v. G. W. Tel. Co.*, 579

25. This court affirms a decree dismissing a bill brought to undo certain things done in another suit still pending. *Id.*, 579

26. The finding of the court in a case tried without a jury, upon conflicting evidence, will not be disturbed upon appeal. *Gregg v. I. C. R. R. Co.*, 590

27. No notice will be paid by this court to alleged errors on the part of a master relating to the allowance of solicitor's fees and the like, the same objections not having been interposed before him. *Kadish v. G. C. L. & B. Ass'n*, 602

28. It is too late to raise for the first time in this court a matter—such as a double reply—by which the party complaining is deprived of no substantial right. *No. W. Brg. Co. v. Manion*, 627

APPELLATE COURTS—JURISDICTION OF—See JURISDICTION, 5, 6; PRINCIPAL AND SURETY, 5.

1. A bill to remove a cloud on the title alleged to have been made by a judicial or tax sale, involves a freehold. *Baker v. Updike*, 516

2. A freehold is involved where realty is claimed by a deed, regular on its face, but which is sought to be set aside as a cloud. *Id.*, 516

3. A bill seeking to correct a description in a mortgage and foreclosing it, likewise involves a freehold. *Id.*, 516

4. So also, when the result of the litigation will transfer the same from one person to another, or deprive one person of a freehold by direct attack on his title. *Id.*, 516

5. It is not sufficient to involve a freehold that the title may be affected, as in foreclosure proceedings, or where the title of a person is decreed to be subject to an execution. *Id.*, 516

ASSIGNMENTS—See FRAUDULENT SALES AND CONVEYANCES, 8.

ATTACHMENT—See INJUNCTIONS, 9; TRESPASS, 1.

ATTORNEY AND CLIENT—See PARTIES, 1.

BAILMENTS—See CONTRACTS, 7, 8.

BASTARDY—See APPEAL AND ERROR, 14.

BILLS OF EXCEPTIONS—See APPEAL AND ERROR, 16.

BONDS—See STATUTORY BONDS.

BUILDING AND LOAN ASSOCIATIONS.

1. That a loan obtained from a building association was procured for the use of some person other than the borrower, can not affect the validity of a transaction involving a loan, as to the parties to it, and it is competent for the loan association to be secured in such case by a trust deed given by such third party. *Kadish v. G. C. L. & B. Ass'n*, 602

BUILDING AND LOAN ASSOCIATIONS. *Continued.*

2. The giving of such trust deed does not operate to make such third party a member of such association. *Id.*, 602

3. A business corporation, possessing no essential of a public corporation and endowed with no public franchise, having obtained a loan from a loan association, is estopped from denying the power of the latter to make the loan in any proceeding begun to enforce the payment of the loan, likewise all persons having dealings with such corporation, especially where the guarantors of the bond given upon the procurement of the loan were the directors of the business corporation and the active agents in procuring the loan, and a judgment creditor having notice of the loan through the recording of the trust deed given to secure it. *Id.*, 602

4. Where the making of a loan was *ultra vires*, good faith demands that the borrower, as well as the creditors thereof, with notice, shall not be relieved, except by payment back of the money. *Id.*, 602

5. In the case presented, this court holds that there is nothing in the contention that the cross-bill ought to have been dismissed because the original bill was not prosecuted to a decree, and that the decree upon the cross-bill, purporting to be on the original as well as on the cross-bill, with a finding and order that there remained no subject-matter for the original bill to act upon, was regular and proper. *Id.*, 602

CARRIERS—See CONTRACTS, 23, 24, 25, 26, 27; RAILROADS; STREET RAILWAYS.

1. A carrier storing uncalled-for goods, on which the freight has not been paid, should store in his own name in order to preserve his lien. Such carrier is not liable for any default of the warehouseman, if it is guilty of no negligence in selecting him. *Gregg v. I. C. R. R. Co.*, 590

2. A common carrier is under obligation to use the highest diligence to prevent injuries to passengers from collision with cars or engines of another road, and where passengers, themselves guilty of no negligence, are injured in consequence of such collision, a *prima facie* presumption of negligence on the part of the carrier arises. The duty of the carrier depends upon the circumstances surrounding the carriage. *W. Chicago St. R. R. Co. v. Martin*, 610

3. If the safety of passengers upon a train approaching a point where tracks cross, depends upon the going forward of servants of such train to scan the track to see whether other trains are approaching, it is negligence to fail to do so. *Id.*, 610

CERTIORARI, WRIT OF—See APPEAL AND ERROR, 9.

CHATTEL MORTGAGES.

1. This court affirms a judgment for the complainant in a controversy involving the question of priority of chattel mortgages. *Birkenhead v. Brown*, 216

CIRCUIT COURTS—JURISDICTION OF—See APPEAL AND ERROR, 14; GARNISHMENT, 1.

CITY COURTS—JURISDICTION OF.

1. One city court in this State can obtain jurisdiction of a cause sent by change of venue from another city court. *E. St. L. Con. Ry. Co. v. Enright*, 494

2. Such court has jurisdiction of such case even though the litigants are not residents of the city wherein it sits, and were not served with process therein. *Id.*, 494

CONTRACTS—See CORPORATIONS, 1, 2, 3, 4, 5, 6; CUSTOM, 1; FRAUD, 1; GUARDIAN AND WARD, 2, 3; RAILROADS, 46, 47, 48, 49.

1. As it is a question of law what will make a valid contract, so it is a question of law what will make it valid as a ratification, if proven, and an instruction authorizing the jury to determine the question of ratification should not be given. *Charter Gas Engine Co. v. Charter*, 36

2. Ratification or acquiescence which will prevent resistance to avoidable contract must be established by the conduct of given parties. The right to repudiate must be lost by affirmative act, or by unreasonable delay after opportunity to act with freedom and with full knowledge of all material facts. *Id.*, 36

3. The second special plea in the case presented, alleging that the contract was made upon the condition therein stated that plaintiff should and would protect defendant in its monopoly under the patent, but that the patent had been continuously infringed, whereby defendant was injured, and that the plaintiff, though notified, took no steps to interfere or protect defendant, *held*, that said plea was bad in not setting up any defense to the promise to pay a sum named for past use of the patent, and also because under its averments all that could be claimed by defendant would be damage suffered, and no damages were alleged. *Id.*, 36

4. Upon a bill filed for the reformation and enforcement of a written contract, this court holds, upon consideration of the evidence, that the same lacks that degree of certainty which justifies the changing of a written instrument in view of parol evidence. *Anderson v. Montgomery*, 79

5. Whether the sum stipulated to be paid upon breach of an agreement is to be taken as liquidated damages, or only as a penalty, will depend upon the intention of the parties, as disclosed by the written contract. *Butler v. Wallbaum Stone & Mining Co.*, 153

6. Whether a certain written contract in a given case amounts to a sale of goods, or whether it is a consignment and not a sale, are questions of law, to be determined therefrom. *Harrison v. Lenz*, 170

7. When the identical article delivered is to be restored in the same or an altered form, the contract is of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to make a return and the title to the property is changed; it is a sale. *Id.*, 170

CONTRACTS. *Continued.*

8. In an action of trespass brought against a sheriff to recover the price of certain goods sold by him on an execution, in favor of a person named, the plaintiff contending that the same were consigned to the execution debtor as his agent, and the defendant taking the ground that the transaction was a sale, this court construes the written contract and holds that the same and the transaction under it did not amount to a sale, express or implied; that it was simply a bailment; and renders judgment for the plaintiff. *Id.*, 170

9. In an action brought by a sub-contractor to recover for digging a ditch, it appearing that the work was not completed, a recovery being had for a sum much less than the price agreed upon, the defendant contending that the contract sued on being special, there could be no recovery on the common counts for the performance of a portion of the work only, and that to entitle the plaintiff to recover on a *quantum meruit* it was necessary to declare specially, this court declines to consider the point, it being raised herein for the first time, and holds that the affidavits filed in support of a motion for a new trial, showing that one of the jurors was asleep during a portion of the trial, and certain newly discovered testimony, were not sufficient of themselves to warrant the court in setting aside the verdict. *Stroud v. Mulcahy*, 176

10. Where an architect is employed to make sketches for a building proposed to be erected, the understanding being that in case the same are satisfactory, working plans and specifications are to be made in accordance therewith, his client is bound to give him a chance to make them satisfactory, by making known his objections. Where, after submission of sketches, the client declines to go on with the work, he is bound to pay a reasonable sum for the services rendered. *Waggeman v. Richardson*, 219

11. In a controversy arising out of a contract providing for the mining of coal under certain real estate, a general demurrer having been sustained to each count of the declaration, this court holds, upon consideration thereof, that the first and third counts are good, and that as to them the demurrer should have been overruled, but as to the rest, that it should have been allowed to stand. *Sylvester v. Hall*, 304

12. When false or meaningless phrases in a contract can be rejected, and yet the body of the contract stand, it is not only lawful, but proper, to reject them. *Hotz v. Bollman Bros. Co.*, 378

13. The rule of construction of all contracts of voluntary obligations, whether as to sureties or principals, is to apply that meaning and to give that interpretation to the words used in the light of the whole instrument, together with any sidelight, in case of ambiguity, as will carry out the evident intent and purpose of the parties thereto. When the construction of the contract is thus adopted, and its meaning determined, then the rule of *strictissimi juris* applies as to sureties on such contract. *Id.*, 378

14. Parol evidence should not be admitted to show the terms of a

CONTRACTS. *Continued.*

given contract, when there is an obtainable writing in existence, covering the same point. Nor of a parol agreement relating to the subject-matter of the writing. *Smith v. Leady*, 441

15. A contract not in general restraint of trade, but only in partial and particular restraint thereof, where the consideration is adequate and the restriction is reasonable, is not void as being against public policy. *Id.*, 441

16. Where damages occasioned by the failure of a given firm to carry out an agreement, forms the subject-matter of defense set up in pleas of set-off, if the averments of such pleas are proven, any excess over the amount of plaintiff's claim in an action brought to recover thereon, can be recovered. The effect of proving the averments of a plea of recoupment will be to merely defeat a recovery by such plaintiff. *Steinhoff v. Electric Light & Power Co.*, 454

17. A verbal contract can not change the terms of a previous written contract duly entered into, or absolve a party thereto from the performance of its terms. *Id.*, 454

18. In an action brought upon a contract touching the construction of an electric light plant, this court holds that the amount of defendant's damages, as established by the evidence, arising from the use of unsuitable material, and from improper construction, exceeded the amount of plaintiff's claim proven, and that the judgment for the defendant must be affirmed. *Id.*, 454

19. Where there is no stated time in which a given thing is to be furnished, a reasonable time must be allowed. *Freeman Wire & Iron Co. v. Hand*, 518

20. In view of the evidence in the case presented, a recovery being sought upon a contract touching advertising, this court declines to interfere with the judgment for the plaintiff. *Id.*, 518

21. The question of the interpretation of a written contract is for the court. *Ehrler v. Worthen*, 550

22. In an action brought to recover upon a contract wherein plaintiff was empowered to act as defendant's agent, compensation to be figured on a certain basis, compensation as to special "sales" and "deals" to be settled mutually on each particular "job," this court holds that the contract, referred to herein, was such special "sale" or "deal," and declines to interfere with the judgment for the plaintiff. *Mather Electric Co. v. Matthews*, 557

23. The nature and interpretation of a contract of shipment must be governed by the law of the State in which it was made. *Merchants Dispatch Trans. Co. v. Furthmann*, 561

24. A receipt delivered to the truckman of a shipper by the carrier upon the receipt of goods, containing conditions touching the conveyance thereof, if the only written evidence of the contract of shipment, is binding on the consignee, although the shipper was ignorant of its terms. *Id.*, 561

25. The receipt can not be considered as expressing the contract of the parties, where the same was surrendered and a bill of lading issued in its stead. *Id.*, 561

CONTRACTS. *Continued.*

26. A failure to object to limitations contained in a bill of lading delivered several days after certain goods had been shipped can not, in view of the trend of decisions in the State of New York, be held to be a waiver of an oral contract of shipment where different terms were agreed upon. *Id.*, 561

27. Parol evidence is admissible to vary the terms of a written contract, where an oral agreement exists as to any matter on which the document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them. *Id.*, 561

28. A contract should receive a reasonable construction. It should be given effect to in accordance with the manifest intention of the parties. *Morris v. Wibaux*, 630

29. A purchaser of cattle can not insist that the obligation to receive the same was limited in a given case to the number estimated in the contract of sale "at about" a certain number of head "more or less," the same providing for the sale of "all of his steers" and "all of his dry cows," of general description and particular location, nor that no recovery can be had on such contract because some of the cattle did not meet the requirements of the contract. *Id.*, 630

30. The action in the case presented being for cattle sold and delivered, and for breach of contract—a failure to receive cattle—for the breach of the contract the burden of proof was upon the plaintiff, the seller thereof, but as to the cattle sold and delivered, the defendant, the purchaser, seeking to recoup damages because of a breach of warranty, the burden of proof was upon him as to such breach and as to any damages. *Id.*, 630

31. Plaintiff was entitled to interest at the rate of ten per cent under the statute of Montana on the price of the accepted cattle not paid for, but for which, under the contract, the plaintiff was entitled to payment when delivered. *Id.*, 630

CONTRACTS VOID AS AGAINST PUBLIC POLICY.

1. A combination to enhance the price of an article of prime necessity, such as wheat or other articles necessary for food, for purposes of extortion, is against public policy, although there may be no attempt to corner the market. *Foss v. Cummings*, 665

2. In the case presented, this court holds that the amendment of plaintiffs' pleading has not so changed the nature of the cause that the conclusions arrived at in a former trial are not applicable to the present appeal, in view of the stipulation involved herein. *Id.*, 665

CONTRIBUTORY NEGLIGENCE—See PERSONAL INJURIES; RAILROADS.

CORPORATIONS—See BUILDING AND LOAN ASSOCIATIONS; INSOLVENCY, 1, 2; INSURANCE—FIRE, 3.

1. While a stockholder represents no interest but his own, a director occupies a trust relation toward all the stockholders. That

CORPORATIONS. *Continued.*

relation demands that he should act in the interest of those whom he represents. He is bound to manage the business intrusted to him in the interest of the stockholders alone, and may not administer the affairs of the corporation for his private emolument. *Charter Gas Engine Co. v. Charter,* 36

2. Without the consent of the stockholders of a corporation, a director can not become a contractor therewith, or have any personal or pecuniary interest in a contract between it and a third person, and such contracts, if made, are voidable at the instance of the corporation or of stockholders. *Id.,* 36

3. Such director may loan money to his corporation and take securities, and obtain debts due him therefrom. A corporation may also avail itself of the property of such director or officer, under circumstances implying a contract to pay a reasonable compensation therefor. If money has been advanced or property furnished in good faith by such person, the corporation is liable to him on an implied assumpsit. *Id.,* 36

4. Plaintiff having claimed to be a director and so acted, is to be treated as such, so far as his claim against the defendant is concerned. *Id.,* 36

5. An instruction setting forth that if a certain quantity of stock was voted at a meeting, for persons named, they were elected as officers of the corporation in question, and ignoring the question whether any notice was given which would authorize the meeting at all, was bad. *Id.,* 36

6. Publication of notice in a newspaper of proposed meeting is not equivalent to personal notice, or notice by mail. A meeting can be held after improper notice only when all stockholders are present, and consenting in person or by proxy. *Id.,* 36

7. A State constitution may be drawn with a view of submitting a given matter to the legislature, by enactment to give it vital force and effect, and to leave it in abeyance until such time as it sees fit to act. *Schertz v. First Nat. Bank,* 124

8. When a constitutional convention indicates an intention to so frame the instrument as to secure the debts of a corporation of a given class by the individual liability of the stockholders to an amount equal to the stock owned by him, but leaves it to the legislature to provide for such other means of security as it should judge most conducive to the public interest, if the legislature should fail to provide a remedy, then the right will still remain, and the common law will supply one. Creditors can not be deprived of their assured security by any omission of the legislature to enact a remedy. *Id.,* 124

9. A suit at law would be the proper action to bring in this State to recover under the Kansas statute providing that a stockholder of a corporation shall not be liable to pay the debts of the corporation in excess of the amount due on his stock, and an additional amount equal to the stock owned by him. The stockholder may make a defense if he has a valid one. *Id.,* 124

CORPORATIONS. *Continued.*

10. A judgment against a corporation in such cases is conclusive as to the amount and validity of the creditor's claim, and when suit is brought to enforce the shareholder's statutory liability, such judgment can be impeached only for fraud and collusion, or for want of consideration. *Id.*, 124

COSTS—See MORTGAGES, 4; WAY, 6.

CUSTOM.

1. A custom, to avail as such, must be certain, uniform, reasonable, and so general as to afford a presumption that parties contracted with reference to it. *O. & M. Ry. Co. v. Allender*, 484

DAMAGES—See CONTRACTS, 5, 16, 18; DRAM SHOPS, 2, 3; LANDLORD AND TENANT, 7, 10; MASTER AND SERVANT: RAILROADS, 5, 23, 38, 60.

1. Upon the case presented, *held*, that the damages were not excessive, the jury having been properly instructed. *Marschall v. Laughran*, 29

DIVORCE—See SEPARATE MAINTENANCE, 1.

DRAM SHOPS—See APPEAL AND ERROR, 12, 13.

1. In an action under the Dram Shop Act, where the proof that plaintiff's husband had received liquor in defendant's saloon was purely circumstantial and was contradicted by positive evidence, *held*, that it was peculiarly the province of the jury to decide on which side the truth lay. *Hanewacker v. Ferman*, 17

2. Immaterial evidence which was admitted against objection bearing on the question of damages, *held*, to have been so carefully guarded by instructions as not to constitute reversible error. *Id.*, 17

3. If defendant sold plaintiff's husband liquors surreptitiously, against repeated protests of plaintiff, after the husband had acquired the habit of drinking to excess, and under circumstances which advised him of the impoverished condition of the family, punitive damages might properly be awarded. *Id.*, 17

4. In an action under the Dram Shop Act brought by a widow to recover damages for the death of her husband, *held*, that the evidence justified the finding that the proximate cause of death was a fall by deceased while intoxicated. *Marschall v. Laughran*, 29

5. Where deceased, after the fall, vomited, any one with a sense of smell was competent to testify as to the presence of spirituous liquor in the contents of the stomach. *Id.*, 29

6. In an action brought to recover a penalty for the alleged violation of a municipal ordinance prohibiting the sale of liquor without a license, the only question raised being as to the propriety of admitting in evidence the record book of the ordinances of the city, containing the ordinance in relation to dram shops, without proof of the due publication thereof, the charter providing for the posting of ordinances in public places, this court holds that the production of the record was sufficient proof *prima facie* of the due posting of the ordinance in question, and of every preceding action of the city council necessary to make it a valid ordinance; and no other authentication or proof was necessary. *Boyer v. Yates City*, 115

DRAM SHOPS. *Continued.*

7. In the prosecution of a saloon keeper for the alleged sale of intoxicating liquor to a minor, the father of the latter should not, upon trial, be allowed to testify that he had told the father of the saloon keeper certain things touching such alleged sales. *Dick v. The People*, 223

8. Where in such case the minor testifies to having purchased liquor of such saloon keeper, and being asked upon cross-examination if he had not told a third person that he could not obtain liquor from such person, answers that he never did, it is proper to allow such person to testify by way of impeachment that he so told him. *Id.*, 223

9. This court is precluded from considering the other errors assigned, for the reason that the record does not show that the pretended ordinance offered in evidence prohibiting the sale of intoxicating liquors, was ever passed or published. *City of Belleville v. Stauder*, 376

EVIDENCE—See ADMINISTRATION, 1; APPEAL AND ERROR, 1, 2, 11; CONTRACTS, 4, 14; DRAM SHOPS, 1, 2, 5, 6, 7, 8; FORCIBLE ENTRY AND DETAINER, 1, 2; INJUNCTIONS, 2; INSTRUCTIONS, 1, 2, 4, 5, 6, 7, 8, 9, 12; MASTER AND SERVANT, 3, 8; MUNICIPAL CORPORATIONS, 14; NEGOTIABLE INSTRUMENTS, 2; PERSONAL INJURIES, 1, 3, 8; RAILROADS, 2, 3, 14, 18, 21, 22, 24, 25, 44.

1. Declarations of an agent, made at a time when not engaged in the transaction of the principal's business, are not admissible as original evidence against the principal. The act and the declaration must unite in order to make such declarations original evidence. *Ehrler v. Worthen*, 550

FELLOW-SERVANTS—See MASTER AND SERVANT, 9, 18.

FIXTURES.

1. The intention of the parties has much to do with the question, whether certain attachments to realty are to be regarded as fixtures that will pass with the land, and this intention is manifested by acts. *Fifield v. Farmers Nat. Bank*, 118

FORCIBLE ENTRY AND DETAINER.

1. Deeds under which a party claim may be read in evidence, in an action of forcible detainer, for the purpose of showing the boundaries or extent of possession. *Griffin v. Kirk*, 258

2. Where actual possession of a part of premises is shown to be in the plaintiff, in an action of forcible detainer, the plaintiff's deed is proper evidence for the purpose of showing the extent of his possession. *Id.*, 258

3. The possession of a riparian proprietor is to the center thread of a given stream to as full an extent as if expressly included in the terms of the deed under which he claims, and he may maintain replevin for sand or gravel taken therefrom by a trespasser who invades that possession. *Id.*, 258

4. A person in possession of lands abutting upon a stream may

FORCIBLE ENTRY AND DETAINER. *Continued.*

maintain forcible detainer against one who invades his possession of lands acquired by accretion. *Id.*, 258

5. A person can not maintain an action of forcible entry and detainer, the land being leased by him to another, although in possession of a third person. *Norris v. Pierce*, 463

6. A judgment should not be rendered against several defendants in such suit, where the evidence shows that only one of them was in possession of the property in question. *Id.*, 463

7. A judgment, in such case, should properly describe the property. *Id.*, 463

FORMER ADJUDICATION—See RAILROADS, 22.

1. When the ownership of personal property has been decided at law to be in a given person, even if an appeal therefrom is taken, the judgment is a bar to a proceeding in equity, brought to obtain possession thereof. *Wright v. Griffey*, 577

FRAUD—See CORPORATIONS, 10; GUARDIAN AND WARD, 3; INSURANCE—FIRE, 5, 6; INSURANCE—LIFE, 4, 5; MORTGAGES, 7; RAILROADS, 32; SALES, 3; TRESPASS, 1.

1. A person induced to part with his property on a fraudulent contract, may, on discovering the fraud, avoid the contract and claim a return of what has been advanced upon it, but he must do so at the earliest practicable moment. *Musick v. Gatzmeyer*, 329

FRAUDULENT SALES AND CONVEYANCES.

1. In the case presented, this court holds, in view of the evidence, that a certain stock of goods was not sold to a third person with the fraudulent intent to hinder and delay creditors of the seller, and that the change of possession thereof was sufficient. *Martin v. Duncan*, 84

2. One indebted and insolvent has no right to make a voluntary conveyance to a third party without consideration, as against the claim of existing creditors. If such a conveyance is made as to such creditors, the law conclusively presumes it to have been done with fraudulent intent, no matter how free from such fraudulent intent the parties may in fact have been. *Austin v. First Nat. Bank*, 224

3. If a conveyance of real estate or other property be made with actual fraudulent intent on the part of the grantor, and the grantee have knowledge of such intent, and participate in it, such conveyance will be deemed fraudulent as to existing creditors. *Id.*, 224

4. The condition of a debtor making a voluntary conveyance, as to solvency, is what the law regards, and not his belief. *Id.*, 224

5. In the case presented, this court holds, in view of the evidence, that the conveyance by a party named, to his son, of certain real estate, was fraudulent in a legal point of view, and that the decree subjecting the same to sale under certain executions, was in the main correct. *Id.*, 224

6. It is not necessary that execution should have issued on such judgments and been returned *nulla bona*, the same being liens on

FRAUDULENT SALES AND CONVEYANCES. *Continued.*

the equitable interest of the grantor, the object of the bill being to remove a conveyance as fraudulent. In such case equity has jurisdiction. *Id.*, 224

7. The court modifies the decree in the case presented, in so far as to allow the application by complainant bank, of funds in its hands, to the extent of one-half thereof, on a certain judgment, the other half to be recovered from the defendant found herein to have conveyed his property in fraud of certain creditors. *Id.*, 224

8. A bill of sale, conveying all of a debtor's property to a creditor, with the provision that such creditor is to sell it, and after satisfying his own claim, return the balance, if any, to the debtor, will be regarded as an assignment for the benefit of a particular creditor, and because of the reservation to the debtor, fraudulent, and void as to other creditors. *Rigor v. Simmons*, 428

GARNISHMENT—See INJUNCTIONS, 9.

1. Garnishment proceedings will not lie in the Circuit Court, upon a judgment of a justice of the peace. *Hughes v. Ft. Dearborn Nat'l Bank*, 567

GAS COMPANIES—See MUNICIPAL CORPORATIONS, 18, 25, 26, 27.

GIFT—See REPLEVIN, 3.

1. A verbal gift unaccompanied by a delivery of possession is not sufficient to change the title thereto. *Phenix v. Gilfillan*, 220

GUARANTY—See NEGOTIABLE INSTRUMENTS, 4.

1. When an offer is made to guarantee a debt about to be created, and the party making the offer does not know that it will be accepted so that he may be ultimately liable, no contract exists between the person making the offer and the party to whom the guarantee was made until the offer is accepted and notice given thereof to the guarantor, and of the intention to act thereunder. *Taylor v. Tolman Co.*, 264

2. When one guarantees the performance of an act or liability as a present undertaking and for a consideration, the guarantor is in such case liable according to the terms of his contract and without notice. *Id.*, 264

3. A consideration being recited in the contract in the case presented, the defendants who signed the same can not be heard to say that it was not received, and the recital of the payment thereof was the acceptance of the guaranty, and the general principles applicable to a continuing guaranty do not extend the bond of an ordinary agent. *Id.*, 264

GUARDIAN AND WARD.

1. A guardian may not use the estate of his ward for his individual profit. *Zander v. Feely*, 659

2. A party can not recover upon a contract wherein a guardian who owned a certain interest in land of which his ward was part owner, agreed to institute and carry through court, proceedings necessary to the consummation of an exchange of such property, for

GUARDIAN AND WARD. *Continued.*

property owned by such party, where it appears that the guardian would have derived benefit therefrom, he refusing to fulfill his agreement. *Id.*, 659

3. Such contract would be void as fraudulent, although the guardian would not be benefited by the carrying through of the same, where he agreed to indemnify the other against having to bid more than a sum named for the minor's interest. *Id.*, 659

HIGHWAYS.

1. Where the evidence in a given case does not disclose how the public obtained the right of way for a public highway, the presumption of law will be, that only an easement was secured. *L. E. & St. L. R. R. Co. v. Lanter*, 339

2. In an action brought by a private individual to recover, from a railroad company, damages arising from the construction of its track along and within a public highway, with the consent of the commissioners of highways, a new highway being opened up at some distance away with the sum paid as damages by said company, such use and occupancy having caused the abandonment of the old highway, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Id.*, 339

HUSBAND AND WIFE—See ADMINISTRATION, 1, 2.

1. Where a husband acts as the agent of his wife in a business transaction, the knowledge he acquires while so acting, is, in law, the knowledge of the wife. *Ehrler v. Worthen*, 550

INFANCY—See DRAM SHOPS, 7, 8; PERSONAL INJURIES, 3, 4.

INJUNCTIONS—See JURISDICTION, 1.

1. The hearing on a motion made in accordance with the provisions of Secs. 15, 16, 17, 18, 19 and 20, Hurd's Revised Statutes, Chap. 69, page 802, is not contemplated to be final on the merits of the case where facts are in issue. *Clabby v. Sheldon*, 166

2. A temporary injunction having been granted in a given case, affidavits filed in support of a motion to dismiss not agreed to be read in evidence as upon final hearing, a given court can not consider them as evidence, upon such hearing. *Id.*, 166

3. No appeal can be taken from an order dissolving a temporary injunction, unless the cause has been submitted on its merits, and the injunction then dissolved. In such case, it would not be necessary to enter a formal decree dismissing the bill to authorize an appeal. *Id.*, 166

4. Where a bill sets up valid grounds for relief and temporary injunction is granted, and upon the counting in of an answer and affidavits denying the allegations of the bill, the injunction is dissolved, it does not follow that the bill should be dismissed. *Id.*, 166

5. An appeal will not lie from an interlocutory decree dissolving an injunction; but a decree dissolving an injunction may be either interlocutory or final. It will be final where no other relief is sought than an injunction, and where it is dissolved for want of equity on

INJUNCTIONS. *Continued.*

the face of the bill; but such an order of dissolution will not be regarded as final, where there has been an answer or replication, and there is equity on the face of the bill, and the hearing not final on its merits, but only on motion alone, or where there is no relief sought. *Id.*, 166

6. In the case presented, this court holds as erroneous the dismissal of the bill upon entering the order dissolving the injunction and that the bill should have been set down for trial. *Id.*, 166

7. Where, upon hearing in such case, the proof shows that the equities were with the complainant, the temporary injunction should be revived and made perpetual. *Id.*, 166

8. Courts of equity will not inquire into the motives which actuate one in proceeding in a legal manner to collect a lawful claim. *Mo. Pac. Ry. Co. v. Flannigan*, 322

9. A non-resident creditor may proceed by attachment against a non-resident debtor and garnishee a foreign corporation doing business in this State, and a court of equity is without jurisdiction to enjoin the collection of such a claim. *Id.*, 322

10. Although a party to a suit should have filed his suggestion of damages at the same term at which an injunction was dissolved as to him, the other party, by appearing and litigating the assessment of damages, without objection, waives error if any exists through failure to do so. *Id.*, 322

11. Upon a bill for an injunction to restrain defendants from operating their tannery, located in close proximity to the residence of complainant, on account of odors and other unpleasant features in connection therewith, this court holds, in view of the evidence, that no case was made out for an injunction, or for damages recoverable in equity, and that the decree for the complainant can not stand. *Lambeau v. Lewinski*, 656

INSOLVENCY—See FRAUDULENT SALES AND CONVEYANCES, 2.

1. Directors of an insolvent corporation, so utterly insolvent as to have abandoned all effort to continue business, can give preferences to creditors of the corporation having knowledge of its condition. *Gottlieb v. Miller*, 588

2. The distinction between a corporation so insolvent as to have stopped business, giving preferences, and one which, by giving a preference, incapacitates itself for further business, has little to recommend it. But the fact that the preference stops the business, does not avoid it. *Id.*, 588

INSTRUCTIONS—See APPEAL AND ERROR, 7, 8, 19; CONTRACTS, 1; CORPORATIONS, 5; MASTER AND SERVANT, 23; MORTGAGES, 6; RAILROADS, 26.

1. A court has no right to instruct the jury in a given case as to what they may regard as the better testimony. *A., T. & S. F. R. R. Co. v. Feehan*, 66

2. This court will not consider an objection to an instruction raised for the first time in the reply brief of an appellant. *Id.*, 66

INSTRUCTIONS. *Continued.*

3. An instruction containing an assumption of a fact in dispute, is bad. *C. M. & N. R. R. Co. v. Eichman*, 156

4. Instructions must always be considered with reference to the facts as developed by the evidence. *Alton Lime & Cement Co. v. Calvey*, 343

5. An instruction authorizing the rejection of all of a witness' testimony if he has sworn wilfully false, without it is supported by other unimpeached witnesses, should not be given. It is proper to direct the jury that the testimony of such witness may be entirely disregarded, except wherein it is corroborated by other credible evidence. *Id.*, 343

6. An instruction assuming as a basis for a declaration of law as to non-liability, a fact directly the converse of that which the undisputed evidence shows to have existed, should not be given. *Id.*, 343

7. An instruction which has no application to the facts proven, should be refused; likewise one that is misleading and not based upon the evidence; likewise one that is superfluous, instructions given containing matter included therein. *J. L. & St. L. Ry. Co. v. L. & N. R. R. Co.*, 414

8. It is not necessary to be stated in the plaintiff's instructions in a given case, that he is required to prove his case by a preponderance of the evidence; it is for the defendant, if desired, to lay down the formal rule of law, as to the preponderance of the evidence. *Mitchell v. Hindman*, 431

9. An instruction, on behalf of defendants, stating that, "the jury are instructed, on behalf of the defendants, that the plaintiff in this case is bound to prove to the satisfaction of the jury by a clear preponderance of the evidence," etc., should not be given. *Id.*, 431

10. An instruction not based upon the evidence, should be refused. *St. L. M. B. T. Ry. Co. v. Wiggins*, 474

11. A general objection to an instruction is not enough. The specific error complained of must be pointed out. *Mather Electric Co. v. Mattheus*, 557

12. A court refusing to admit a given contract in evidence, should not give instructions based upon the hypothesis that such a contract existed. *W. Chicago St. R. R. Co. v. Martin*, 610

13. If an instruction is proper it will not be made vicious, because given at the instance of one who was not in a position to demand it. *Id.*, 610

INSURANCE—FIRE—See AGENCY, 5.

1. At common law a number of people may enter into mutual covenants to indemnify each other against loss by fire and unless restricted by statute such agreements will be valid. *Clark v. Spafford*, 160

2. The enforcement of a proportionate contribution from the numerous parties to the agreement for mutual indemnity in the case presented, and the ascertainment and assessment of the proportion-

INSURANCE—FIRE. *Continued.*

ate shares of such parties are proper subjects for a court of equity, to which its methods of procedure are well adapted. *Id.*, 160

3. In an action brought to recover for loss by fire upon a certificate issued before the company commenced business but during its organization, it being provided that it should not so commence until a certain amount of insurance, in not less than a certain number of risks, should have been subscribed, and the premiums thereon aggregating not less than a certain sum named paid in cash, this court holds that there is nothing in the contention of defendants that the certificates in question were void because in derogation of the statute concerning insurance companies, and that the bill disclosed no right in the complainants to any relief under their certificates; that the certificate holders did not assume to act as a corporation; that there was no misrepresentation as to the owners of the property destroyed; that the demurrer to the amended bill should have been overruled, and that the order sustaining the same and the decree dismissing said bill must be reversed and the cause remanded, with directions as to the proper course to pursue. *Id.*, 160

4. This court reverses the judgment for the plaintiff in an action upon an insurance policy, assured having failed to furnish sworn proofs of loss within thirty days after the goods in question were burned, the furnishing of such proofs being, under the policy, a condition precedent to a recovery, no waiver having been made. *Duelling Ho. Ins. Co. v. Jones*, 261

5. In an action brought to recover upon an insurance policy, this court finds, in view of the evidence, that a plaintiff named made fraudulent representations to the agent of defendant company as to the quantity and value of the property described in the policy, for the fraudulent purpose of obtaining excessive insurance; that such agent relied upon the truthfulness of such representations in ignorance of their falsity; that the policy thus became void and of no effect, and that the judgment against the company must be reversed.

Hartford Fire Ins. Co. v. Magee & Ettleson, 367

6. This court likewise holds that such misrepresentations were not avoided by the fact that the company's agent saw the property in question. That the opportunity to ascertain the quantity and character thereof, not taken advantage of, did not purge or purify the misrepresentations, or nullify their legal effect. *Id.*, 367

INSURANCE—LIFE.

1. In an action brought by a member of a subordinate lodge of a mutual benefit association, said association having sought to forfeit the charter of the former, in an illegal manner, in view of its constitution, this court holds that such action did not operate to relieve it from liability to the plaintiff, and that the judgment in his favor can not be interfered with. *Order of Iron Hall v. Moore*, 251

2. Application for reinstatement in a mutual benefit association amounts to an acknowledgment that applicant was lawfully suspended. *A. O. U. W. v. Cressey*, 616

INSURANCE—LIFE. *Continued.*

3. When, at the time of such application, assessments have not been paid up, and applicant offers to pay them, it will be assumed that he had notice that he was delinquent as to them. *Id.*, 616

4. The contract of insurance is essentially one of good faith; a reinstatement, obtained upon false and fraudulent representations, will not be binding on the insurer. *Id.*, 616

5. The fact that, after the reinstatement of such member, his subordinate lodge allowed him sick benefits, or paid assessments for him, can not conclude the grand lodge from setting up the defense of fraud, in obtaining reinstatement. *Id.*, 616

INTEREST—See CONTRACTS, 81.

INTOXICATING LIQUORS—See DRAM SHOPS.

JUDGMENTS AND DECREES—See ADMINISTRATION, 5, 6; APPEAL AND ERROR, 21, 22; BUILDING AND LOAN ASSOCIATIONS, 5; CORPORATIONS, 10; FORCIBLE ENTRY AND DETAINER, 6, 7; INJUNCTIONS, 5; LANDLORD AND TENANT, 10.

1. A judgment stating the sum of the judgment and costs and adding "whereof let execution issue," is equivalent to formally stating that the "plaintiff have and recover from the defendant" the amount found due. *Schertz v. First Nat. Bank*, 124

2. A verdict for ——— dollars is a nullity upon which a judgment can not be entered for "——— dollars." A judgment in favor of a given person must represent the ultimate fixed and precise determination of the judicial proceeding in which it is entered. *School Directors v. Newman*, 364

JURIES—See PRACTICE, 1, 3; VERDICTS, 1, 2, 3.

1. It must be presumed that jurymen have ordinary intelligence and comprehension. *Gartside Coal Co. v. Turk*, 332

JURISDICTION—See APPELLATE COURTS—JURISDICTION OF; CIRCUIT COURTS—JURISDICTION OF; CITY COURTS—JURISDICTION OF; FRAUDULENT SALES AND CONVEYANCES, 6; GARNISHMENT, 1; INJUNCTIONS, 9; PRINCIPAL AND SURETY, 5.

1. A court of chancery has no jurisdiction to restrain and enjoin the prosecution of a suit based upon the violation of a municipal ordinance and to settle the legality thereof. *C. B. & Q. R. R. Co. v. City of Ottawa*, 73

2. No matter how numerous the suits may be, equity will not interfere on the ground of the invalidity of the ordinance under which the prosecution is had, or the innocence of the party complaining. *Id.*, 73

3. Upon a bill filed by a railroad company to enjoin the prosecution of thirteen suits at law, brought by a municipality against it under an ordinance of a city requiring complainant to put gates at certain street crossings to protect persons crossing over its track against injury from trains on its road passing through said city, this court holds that the case presented comes within the general rule. *Id.*, 73

JURISDICTION—*Continued.*

4. Parties to a suit having submitted themselves to the jurisdiction of a given court, can not attack such jurisdiction upon appeal.

Anderson v. Montgomery, 79

5. Upon a bill filed to procure the construction of a will where the contention of complainants was that the will should be so construed as that one of the complainants became the absolute owner in fee of real estate devised by the will, which contention was disputed by defendants: *Held*, that a question of freehold was involved and that an appeal from the decree of the Circuit Court should have

been to the Supreme Court. *Furnish v. Rogers,* 245

6. While this court would not have jurisdiction to consider an appeal which involved a franchise, that is, where its judgment would result in sustaining or ousting a franchise, it has jurisdiction to determine whether or not proceedings instituted were such that could legally involve a franchise. *Citizens Horse Ry. Co. v. City of Belleville,* 388

LANDLORD AND TENANT—See NEGOTIABLE INSTRUMENTS, 6; RAILROADS, 12, 13, 14, 15; REAL PROPERTY.

1. In an action brought to recover for rent alleged to be due, fixtures removed, money paid in repairing damages done to the building in question, and the price of an iron grating, this court holds, in view of the evidence, that the judgment for the plaintiff was too small in a sum named, and reverses the same. *Powell v. Bergner,* 33

2. Provisions in leases that upon a re-entry for breach of covenants the landlord may re-let the premises for the account of the lessee, holding him for any deficiency, have uniformly been upheld. *Grommes v. St. Paul Trust Co.,* 568

3. An eviction is not a bar to rent that had previously accrued. *Id.,* 568

4. A clause providing that a re-entry may be made without the same "working a forfeiture of the rents to be paid," refers to rents to be paid after the re-entry. *Id.,* 568

5. Where a lease contains a clause prohibiting sub-letting, in case it takes place, receipt of rent by the landlord from the sub-tenant does not release the tenant from his promise to pay. *Id.,* 568

6. In an action against the guarantors upon a lease of the payment of rent provided for therein, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Id.,* 568

7. An agreement in a lease to pay so much per day as liquidated damages for each day possession is withheld after the termination of the lease by lapse of time, is valid; not to be treated as a penalty, but enforced. *Poppers v. Meager,* 593

8. In view of the evidence in the case presented, this court holds that the payment by a party named, of a sum amounting to one month's rent, which was subsequently returned, is not to be regarded as anything more than a mere deposit, to be taken as rent if the negotiations terminated in a lease, and to be returned if they did not.

LANDLORD AND TENANT. *Continued.*

This court holds, in the absence of evidence of any communication between the parties hereto, by which the plaintiff is estopped, that the defendant wrongfully held over, and declines to interfere with the judgment against him. *Id.*, 593

9. Where the defendant, in an action of debt for rent, pleads *nil debet*, and the plaintiff joins issue, and it is overcome by a production of the lease, and testimony as to the rent unpaid thereon, no further proof upon the issue thus made is necessary. *N. W. Brg. Co. v. Mansion*, 627

10. The judgment in the case presented being for a sum equal to the entire amount that would accrue to the end of the term, to be discharged upon payment of the rent found due, up to the bringing of the present suit, together with interest, this court holds that the same is erroneous, and that it should have been, that the plaintiff have and recover his debt to the amount of the accrued rent and his damages, the amount of the interest thereon and his costs and charges. *Id.*, 627

LIMITATIONS—See ADMINISTRATION, 1; MORTGAGES, 10; NEGOTIABLE INSTRUMENTS, 1, 2, 3.

MALPRACTICE.

1. In an action for malpractice this court holds that the condition in question did not result from the accident, but from the failure of the surgeons to use ordinary skill and care in the treatment thereof, and that the judgment against them can not be disturbed. *Mitchell v. Hindman*, 431

MASTER AND SERVANT—See RAILROADS, 39, 40, 41, 42; SCHOOLS, 1.

1. In an action brought by an employe to recover for personal injuries, suffered in the course of his employment, through falling into an unprotected elevator shaft, this court holds that the evidence supports a finding of negligence on the part of the defendant; that the release of damages obtained from the plaintiff on account of his injuries was not fairly obtained, and that the judgment in his favor can not be disturbed. *National Syrup Co. v. Carlson*, 178

2. The law will imply that a servant has noticed those things which it was his duty to observe, and with which he had ample opportunity to become acquainted. *A., T. & S. F. R. R. Co. v. Alsdurf*, 200

3. It is proper in a personal injury case to show the authority an engineer had by virtue of his position as engineer and topman in a coal mine, to give directions to those working under him, also to admit evidence as to the condition of certain machinery, and the length of time it had been in the condition testified to by the witness, in view of an averment in a declaration that a defendant was bound to keep his machinery "in reasonably good and safe condition," and that it did not. *Gartside Coal Co. v. Turk*, 332

4. In an action brought to recover for a personal injury to a servant received in the course of his employment, he not having been instructed as to the dangers incident thereto, this court declines, in

MASTER AND SERVANT. *Continued.*

view of the evidence, to interfere with the judgment for the plaintiff. *Id.*, 332

5. In the use of a dangerous agent like dynamite, great care must be taken to prevent accidents. A high degree of diligence rests upon an employer using such explosive, to see that unexploded dynamite is not left where employes are directed to work, and it is a question of fact in a given case whether such care was or was not used. *Alton Lime & Cement Co. v. Calvey*, 342

6. In accepting employment in a quarry a person can not be said to assume the risk of finding unexploded dynamite in the rock he is called upon to break. *Id.*, 342

7. Where it is sought to remove such unexploded charge, care should be taken that all be removed, or at least employes should be warned of the presence of a portion thereof. *Id.*, 342

8. A witness should not be asked whether a certain occurrence was one of the risks of a given employment. Such question is for the jury, in view of all the facts and circumstances of the case. *Id.*, 342

9. The ex-servant who placed the dynamite in the rock, was not the fellow-servant of the plaintiff herein. *Id.*, 342

10. A servant has the right to rely upon his master's compliance with a duty by the law imposed as to the dangers of his employment, and in the absence of notice to the contrary, has the right to conclude that the place in which he is required to work is not dangerous, and that the kind of work he is directed to do can be safely done, without a critical examination of the surroundings. *Consolidated Coal Co. v. Bruce*, 444

11. In an action brought to recover for a personal injury, the declaration should not allege that the plaintiff had no notice of a certain condition of things when he was in presence thereof, unless some reason can be assigned why he was not in possession of his senses. *Id.*, 444

12. The averment of the plaintiff in the case presented, that he used due care and caution in performing the work he was called upon to do, is not negatived by the fact that he did not notice the steepness of a certain grade. *Id.* 444

13. An employe, who, knowingly, continues the use of a defective tool without complaint, no promise to repair the same having been made, assumes the risk attending such use. *L. E. & St. L. Con. R. R. Co. v. Allen*, 465

14. If such tool, originally in good condition, becomes unsafe through use, a person injured while using the same, in order to recover, must show that his employer, or some person whose duty it was to report to him, was informed of such condition. *Id.*, 465

15. It would have been sufficient, if notice had been brought to the attention of the section foreman, in the case presented. *Id.*, 465

16. The fact that a person's condition at the time of bringing a suit against his employer to recover for personal injuries suffered

MASTER AND SERVANT. *Continued.*

through his negligence was the result of intoxication, will not release the defendant from the damage caused by his negligence. *E. St. L. Con. Ry. Co. v. Enright*, 491

17. In an action brought by an employe of a railway company to recover for personal injuries received from the fall of a telegraph pole which he was assisting to remove, this court holds, in view of the evidence, that he had a right to believe that he was not in any danger in performing the work as directed; that a case of negligence is clearly made out, and that the judgment for the plaintiff must be allowed to stand. *Id.*, 494

18. It is not the law, that because the engineer had notice of the defective condition of the wheels of the tender to his engine, and he was a fellow-servant of a brakeman on a given train, that therefore the latter had notice. The doctrine of fellow-servants will apply in such case if an injury occurs through the negligence of such engineer. *I. C. R. R. Co. v. Pirtle*, 498

19. In an action brought to recover for the death of a railroad brakeman, the same being alleged to have occurred through the use of a tender with defective wheels, this court holds, in view of the evidence, that the judgment for the plaintiff can not be disturbed. *Id.*, 498

20. The ordinance of the city of Chicago touching "proper safeguards" for vats containing hot liquid, means proper safeguards with reference to the work to be done, and which, while affording reasonable security, do not unreasonably interfere with the work which must be performed. *C. P. & P. Co. v. Rohan*, 640

21. Only an expert in a given business can tell whether a railing around a given vat was a proper safeguard. *Id.*, 640

22. It was error in the case presented to leave the jury by the instruction free to say as to whether the railing in question was a "proper safeguard," no evidence having been introduced on this point. *Id.*, 640

23. A person can not recover for an injury arising from improper safeguards, where he continues at work with knowledge thereof, without complaint. *Id.*, 640

24. In the case presented, this court holds that the judgment for the plaintiff can not stand, upon the ground that the plaintiff, when injured, was not in the exercise of ordinary care. *Id.*, 640

MECHANICS' LIENS.

1. The lien law does not operate to make the debt of a contractor the debt of the owner of the building. *Tanquary v. Walker*, 451

2. The promise of a property owner to supply-men to pay the bills of contractors, does not prevent the supply-men, as a matter of law, from enforcing their lien. *Id.*, 451

MONOPOLIES—See CONTRACTS VOID AS AGAINST PUBLIC POLICY, 1, 2.

MORTGAGES—See APPELLATE COURT, JURISDICTION OF, 3; REPLEVIN, 1; WAY, 8, 9.

1. In a controversy in which was involved the one point, whether or not a certain mortgage and notes were assigned and delivered as

MORTGAGES. *Continued.*

a gift or for collection, this court declines, in view of the evidence, to interfere with the decree taking the latter view. *Rackley v. Rackley*, 95

2. A deed absolute on its face, if intended by the parties as security for a debt, is a mortgage, with right in the grantor to redeem. *Keithley v. Wood*, 102

3. Where, in a given case, it is doubtful whether a given transaction was a mortgage or a conditional sale, it should be held to be a mortgage. *Id.*, 102

4. In the case presented, this court holds that the transaction in question was a mortgage, not a sale; that while the testimony of complainant's wife was improperly received, the facts and circumstances surrounding the transaction, considered in connection with the conflicting testimony of the parties to the suit, justify the above conclusion, and that the trial court correctly decreed that the greater part of the costs be paid by appellant, because they were made by the wrongful refusal of appellant to acknowledge complainant's rights. *Id.*, 102

5. The verdict of a jury on a bill to foreclose a mortgage is merely advisory, and not binding on the chancellor. *Farrier v. Cox*, 273

6. This court holds that the assignment of the notes and the amount paid therefor could not enlighten the jury in the case presented, in determining whether the defendant had paid the notes under all the evidence in the case, and a certain modification by the court of a given instruction was improper, in the suggestion that it might be taken, in connection with other facts, in determining whether the notes had been paid. *Id.*, 273

7. In view of above, and the evidence, in a proceeding brought to foreclose a mortgage, the defendants claiming that notes involved were obtained by fraud, the judgment for the defendants can not stand. *Id.*, 273

8. When a person has been appointed a receiver pending foreclosure proceedings, he may be required to account for rents received, and keep the property insured therefrom. *Robinson Bank v. Miller*, 310

9. In a controversy based upon a bill filed for the cancellation of certain mortgages, the case being here the second time upon the original bill, the cross-bills of certain mortgagees, and petition for the appointment of a receiver pending the litigation, this court declines, in view of the evidence, to interfere with the decree of the trial court refusing to cancel certain mortgages, but providing for the foreclosure of the same, the dismissal of a certain cross-bill, and appointment of a person named as receiver of the mortgaged property. *Id.*, 310

10. Upon a bill filed to foreclose a mortgage, this court declines to interfere with a decree dismissing the same, the defense being based upon the statute of limitations. *Kluge v. Kluge*, 337

MUNICIPAL CORPORATIONS—See JURISDICTION, 3; OFFICERS, 1, 2; PERSONAL INJURIES, 5, 6, 7, 8, 9; STREET RAILWAYS.

MUNICIPAL CORPORATIONS. *Continued.*

1. Whether or not the leaving of a gravel pile in a street ever night did not render the same unreasonably unsafe for travelers, and whether or not such street was well lighted upon the night of an accident, are, in a given case, questions of fact for the determination of the jury. *City of Aurora v. Rockabrand*, 106

2. In an action brought to recover from a municipality for personal injuries suffered through the overturning of plaintiff's wagon in the night time by reason of a pile of gravel being left upon a highway, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Id.*, 106

3. The rule that "the principle of *respondeat superior*" does not lie as to the cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act and has no choice in the selection of workmen, and no control over the manner of doing work under the contract, while true in a general way, has its exceptions. *City of Sterling v. Schiffmacher*, 141

4. Where a municipal corporation has the duty, either by express statute or implication of law, cast upon it, to keep its streets and crossings in a reasonably safe condition for public travel, such duty can not be delegated to another in whatever form it may be attempted, so as to free the corporation from liability for any injury occurring to another on account of such failure to observe such duty. *Id.*, 141

5. Where acts which cause a given injury are collateral to the contract work and are negligently done, the negligent person is alone responsible; but where the work contracted for is intrinsically dangerous in itself, and it is negligently done and injury ensues, the municipality is liable. *Id.*, 141

6. In an action brought to recover for a personal injury occasioned through plaintiff's falling into an excavation dug in a street in pursuance of a contract entered into by a city with a third person touching the construction of certain sewers, this court holds that the injury in question occurred on account of failure on the part of the city to use reasonable care to keep the streets in a reasonably safe condition, or of a failure to properly guard or light the dangerous excavation—a duty imposed by law upon it which it could not abdicate; that no notice to the city was required that the ditch was not guarded, nor lighted, and declines to interfere with the judgment for the plaintiff. *Id.*, 141

7. A municipal corporation has the right to have gas and water pipes sunk in its streets, and to give permission for the sinking thereof, and in such case the city is only required to use ordinary care in notifying the public traveling on such streets of the true condition thereof, and if the public knows of such condition, or by the exercise of ordinary care could have known of it, the city is excusable for failure to give notice. *City of Peoria v. Walker*, 182

8. A person is negligent in placing himself in a position where,

MUNICIPAL CORPORATIONS. *Continued.*

by the frightening of his horses, he will be in peril, particularly where there is a safer way open. *Id.*, 182

9. If ordinary prudence requires it, a municipality must construct barriers against teams and wagons falling into ditches being excavated in its streets, and it is a matter of fact for the jury in a given case to determine whether ordinary care required the city to guard against such accident as happened in such case. *Id.*, 182

10. In an action brought to recover from a municipality for a personal injury alleged to have been occasioned through its negligence in connection with an excavation in one of its streets, this court holds that the plaintiff was negligent in driving upon that portion of the street in question, where he received his injury, and that the judgment in his favor can not stand. *Id.*, 182

11. There can be no recovery in such case where the plaintiff, when injured, was not exercising ordinary care. *Id.*, 182

12. In an action by the owner of a lot against a city to recover damages for injury from an improvement of an adjoining street, the jury are to determine whether the improvement taken as a whole, damaged the property. If the benefits exceed or equal the damage, the plaintiff can not recover. *City of Savanna v. Loop*, 214

13. The question is as to whether the property has been depreciated in value by the construction of the improvement, and this can be determined from an estimate of the value of the property immediately before and after the construction of the improvement. *Id.*, 214

14. It is proper in such case to admit in evidence a plat showing the land described in the declaration to be divided into town lots. *Id.*, 214

15. A municipal order not having been indorsed by the payee to the holder thereof, any defense may be set up against the same, if the trustees who signed it had power to issue it, against the holder, even though he purchased for value, as could have been made against the payee; and although the order was payable in a given case to a person named, or bearer, it can not be transferred by delivery so that any defense will be cut off that could be made against the payee. *Bourdeaux v. Coquard*, 254

16. Municipal corporations of the character referred to in the case presented, can exercise no other powers than such as are expressly granted, or necessarily implied from the statutes that created them, to carry into effect the power granted. *Id.*, 254

17. A municipal corporation has no inherent power to issue commercial paper, and has no right to do so, unless such power is granted in the charter thereof. Persons dealing in such paper must see that the power exists. The trustees in the case presented had no authority to issue the order in question. *Id.*, 254

18. In an action brought by a gas company for the use of a person named, against a municipality, to recover damages for the repudia-

MUNICIPAL CORPORATIONS. *Continued.*

tion by the latter of a contract with the former, providing for a supply of gas for the period of thirty years, said person being the assignee of such contract, this court holds the same to have been invalid, one which the city could at any time repudiate; that the declaration did not state a good cause of action; that the general demurrer was properly sustained thereto, and that the judgment against the plaintiff for costs, can not be interfered with. *E. St. L. Gas L. & C. Co. v. City of E. St. Louis*, 411

19. A peddler is a person who travels about the country with merchandise for the purpose of selling it; an itinerant vender of small wares which he carries with him for sale. *City of Olney v. Todd*, 439

20. In an action wherein certain defendants were charged with violating a municipal ordinance by peddling in a given city without a license, this court holds that the evidence did not show them to be peddlers, and affirms the judgment in their favor. *Id.*, 439

21. A municipality is bound to keep and maintain its sidewalks in a reasonably safe and suitable condition for the use of pedestrians; and a failure to perform this duty is negligence, creating primary liability to respond in damages to one injured by reason of such negligence. *City of Murphysboro v. Woolsey*, 447

22. This court holds that there is nothing in the contention of defendant in the case presented, that it is not liable because the mother of the infant injured, pushed it, whereby it fell from the sidewalk, the evidence not establishing such contention, it appearing that such walk was not protected by a railing or other guard. *Id.*, 447

23. The suit in question having been brought by a child to recover damages himself for injuries received by him, the negligence or want of care of the parent in charge of him alleged to have contributed to the accident does not exonerate the defendant, nor bar the plaintiff's right to recover. *Id.*, 447

24. Eleven months is ample time for a municipality to ascertain that one of its sidewalks is unsafe, and to put it in proper condition. *Id.*, 447

25. A constitutional provision designed for the protection of tax payers, forbidding the incurring of any indebtedness by a city, directly or indirectly, in any manner, for any purpose, beyond a certain limit, should not be disregarded or evaded, and a court of equity ought not, by its decree, assign and appropriate any portion of city taxes collected, to the payment of the forbidden indebtedness. *Griswold v. City of East St. Louis*, 450

26. It will be presumed that a gas company knew of such constitutional provision when they furnished a given municipality light, and that if the limit had been exceeded by creating the indebtedness for such services, the indebtedness would be illegal and uncollectible, and if it chose, with such notice and knowledge, to furnish lights to the city, it did so at its own risk, and would not be entitled in law or equity to recover any part of such debt. *Id.*, 480

MUNICIPAL CORPORATIONS. *Continued.*

27. If in such case, warrants—not certificates—payable from a specific appropriation of a tax levied, but not collected, were accepted by such company in exchange for light furnished, or to be furnished, it would amount to an exchange of one thing for another, creating no debt against the city, but in full payment for such services. *Id.*, 480

MUTUAL BENEFIT ASSOCIATIONS—See INSURANCE—LIFE, 1, 2, 3, 4, 5.

NEGLIGENCE—See CARRIERS; MASTER AND SERVANT; RAILROADS; PERSONAL INJURIES.

NEGOTIABLE INSTRUMENTS—See MORTGAGES, 6, 7; MUNICIPAL CORPORATIONS, 17.

1. The requirement set forth in Sec. 16, Chap. 83, R. S., that the payment or new promise shall be “in writing,” does not apply so far as to require the evidence of it to be so preserved, and the words “in writing” have reference alone to the specified new promise to pay. *Bowles v. Keator*, 98

2. In case part payment is alleged, the trial court should admit all evidence, written or verbal, which tends to establish payment. It is not necessary that any writings to establish or prove such facts be signed by any one, so that they are evidence of transactions actually taking place between the parties, and made at the time or by the consent of the parties to be charged. *Id.*, 98

3. Payments on a note made after the statute of limitations of ten years went into effect, on July 1, 1872, would not operate to extend the time under the previous statute of sixteen years, but under the new statute. *Kluge v. Kluge*, 337

4. In an action brought upon a promissory note given under a certain contract, whereby the payees agreed to indemnify the maker against liability as guarantor of certain bonds, defendant setting up the non-performance of the condition of the indemnifying bond, this court holds that such defense, if true, would be no defense to the case presented; that the demurrer to said plea was properly sustained; that there is nothing in the error assigned as to the manner of entering judgment herein, and that the same must stand. *Kamp v. Branch Crook's Saw Co.*, 548

5. No contingent event that *may* happen after the transfer of a promissory note, can affect the negotiability. *Ehrler v. Worthen*, 550

6. In an action brought to recover upon a promissory note, the plaintiff being the indorsee thereof, the same being given for one year's rent of a certain farm rented under a five years' lease, it providing that in case of damage from high water the rent should be reduced according to the damage done, the fact being that no damage from such cause occurred until after the transfer of the note, this court holds, said note having been transferred as collateral security for an indebtedness less than its face, that as to such sum the judgment for the plaintiff could not be disturbed, but that as to

NEGOTIABLE INSTRUMENTS. *Continued.*

the residue, any defense could be interposed as to the assignee, that could have been raised between the original parties. *Id.*, 550

NEW TRIAL—See APPEAL AND ERROR, 17, 20; CONTRACTS, 9.

1. It not appearing that any exception was taken in the trial court to the overruling of a motion for a new trial, this court will not consider certain alleged errors assigned, upon appeal. *Order of Iron Hall v. Moore*, 251

NUISANCE—See INJUNCTIONS, 11; RAILROADS, 52.

1. The liability of a grantee of land with a nuisance upon it, for maintaining the same, only arises after notice to abate it. *Wabash Railroad Co. v. Sanders*, 436

OFFICERS—See CORPORATIONS, 1, 2, 3, 4, 5; PRINCIPAL AND SURETY, 3; STATUTORY BONDS.

1. Where a person sues or defends in his own right as a public officer, it is not enough that it shall appear that he is an officer *de facto*. It must also be made to appear that he is an officer *de jure*. *Home Ins. Co. v. Tierney*, 600

2. In an action brought by an alleged boiler inspector of the city of Chicago, to recover fees alleged to be due, the testimony of such person that he is such inspector should not be admitted. His appointment as inspector should appear by the production of evidence showing that the same was in conformity with the ordinance relating to the inspection of steam boilers. *Id.*, 600

ORDINANCES—See DRAM SHOPS, 6, 9; JURISDICTION, 1, 2, 3; MASTER AND SERVANT, 20; MUNICIPAL CORPORATIONS, 19, 20; RAILROADS; STREET RAILWAYS.

PARTIES—See PERSONAL INJURIES, 9; RAILROADS, 27.

1. A person being a party to the record in a given case, as a member of a firm named and not dismissed therefrom, he is still a party to the record, although pending litigation he dissolves connection with such firm, and the attorneys who appeared for the firm continue to be his attorneys of record, and it is proper to require him to make answer to cross-bills in such case. *Robinson Bank v. Miller*, 310

PARTNERSHIP.

1. The affidavit in question being defective in view of Sec. 7, Chap. 84, R. S., this court holds that a limited partnership was not formed in the case presented. *Crouch v. First Nat. Bank*, 574

PATENT LAW.

1. A licensee can not raise the question of the validity of a patent as between the patentee and the United States, where such license has not been molested: because in such case the licensee has got all he bargained for. *Charter Gas Engine Co. v. Charter*, 36

PAYMENT.

1. What was a reasonable time in which to make a payment in a given case, is a question of fact for the jury. *Butler v. Wallbaum Stone and Mining Co.*, 153

PEDDLERS—See MUNICIPAL CORPORATIONS, 19, 20.

PERSONAL INJURIES—See CARRIERS, 2, 8; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS.

1. Testimony as to the general habits of deceased as to care and caution, is admissible in personal injury cases only where no witness was present at the time of an accident, and the exact manner in which the death occurred can not be made to appear to the jury. *C. St. P. & K. C. Ry. Co. v. Anderson*, 91

2. In the case presented, this court holds, in view of the evidence, that deceased met his death through his own negligence. *Id.*, 91

3. In an action brought by a child of tender years, by next friend, to recover damages for a personal injury alleged to have been caused by negligence of defendants, evidence that plaintiff's mother was pregnant, was admissible, on the theory that plaintiff was responsible for his mother's negligence, on which theory the case was tried, to show that the mother was unable to give her child more attention. *E. J. & E. Ry. Co. v. Raymond*, 242

4. Whether plaintiff, in such action, could be held responsible for her parent's negligence, *quære*. *Id.*, 242

5. A street contractor having knowledge that persons passed along a street which he was engaged upon and that the same was in a dangerous condition, is bound to erect guards at dangerous places, or display cautionary signals to give notice of the danger. *Vieths v. Skinner*, 325

6. A stranger seeing people traveling upon a street in the night time, has a right to assume that the same is reasonably safe, and to go upon the same, but must use ordinary care. *Id.*, 325

7. The question whether a person was using ordinary care to avoid injury in passing along a street at the time and place of receiving a given injury is a question of fact to be determined by the jury. *Id.*, 325

8. It is proper in an action against persons under contract with a city to repair and improve one of its streets, to recover for a personal injury alleged to have occurred through their negligence, service of process having been had only on one of the defendants, to admit the contract in evidence, in order to show the control exercised by the contractors over the street in question, and their connection with the performance of the work being done, and such evidence is proper in a proceeding against the defendant served only. *Id.*, 325

9. In an action on the case to recover for a personal injury resulting from the negligence of several persons, the plaintiff may sue all or some of the parties jointly, or one of them separately, and when the declaration charges two or more, and one only is served with process, each being jointly and severally liable, it is not error to proceed to a judgment against one only, nor would the rule be different in actions *ex delicto*, if all the defendants had been served and judgment taken as to one only. *Id.*, 325

PERSONAL INJURIES. *Continued.*

10. It is essential to the right of recovery in a personal injury case, that the person injured was, at the time of the accident, in the exercise of due and reasonable care. *C. C. C. & St. L. Ry. Co. v. Arbaugh*, 360

PLEADING—See CONTRACTS, 3, 9, 11; RAILROADS, 1, 52; VARIANCE, 1.

PRACTICE—See APPEAL AND ERROR, 4; PRINCIPAL AND SURETY, 2, 4; REPLEVIN, 6.

1. The right to poll a jury may be waived; in the absence of a rule justifying the polling of several of the jury upon one day and the balance upon a subsequent day, such action would be improper. *Drda v. Schmidt*, 267

2. This court likewise holds that the trial court properly allowed complainant to file an amended bill after the evidence was introduced and arguments heard. *Koch v. Roth*, 458

3. The right to a trial by an impartial jury, is fundamental. The law permits an examination to ascertain whether or not the jurors are impartial, as between the litigants. If certain facts are ascertained by one examination, they constitute cause of challenge. The field of inquiry is not limited, however, to the ascertainment of these facts alone. *City of Vandalia v. Seibert*, 477

4. Within the general limits of propriety and pertinency, the examining counsel may search for facts that will reasonably justify a peremptory challenge. A right to the discretionary exercise of three peremptory challenges in civil cases, implies a corresponding right of entering upon subject-matters of inquiry, within the rule above prescribed, which might lead to the discovery of facts that might be made the basis for the intelligent exercise of such discretionary right. *Id.*, 477

5. In the case presented, this court holds as error the refusal to allow defendant's attorney, in the examination of the jury prior to its acceptance, to ask if the attorneys for the plaintiff were at such time in the employ of any juror in any case not disposed of. *Id.*, 477

6. In the case presented, this court holds as proper the granting of leave to plaintiff, after the evidence was closed, and while the cause was being argued to the jury, to file an amended count to the declaration *instantly* to meet the evidence introduced touching a later agreement, no claim of hardship or surprise having been made by the defendant, and likewise that no special count was necessary; the contract being at an end and nothing remaining but to pay money, *indebitatus assumpsit* was sufficient. *Mather Electric Co. v. Matthews*, 557

PRINCIPAL AND SURETY—See CONTRACTS, 13.

1. In an action of debt based upon a bond given by a stone company, conditioned to furnish building material within a certain time, and upon certain payments, a breach in this respect being alleged, this court holds, that as a claim for liquidated damages the second count of the declaration was bad; that the third count, alleging

PRINCIPAL AND SURETY. *Continued.*

special damages, was bad, and that judgment for the defendant can not stand. *Butler v. Wallbaum Stone & Mining Co.*, 153

2. An action brought in the name of the people of the State for the use of a given county, on the official bond of a county collector, to recover for alleged breaches of the conditions thereof, is not a case relating to the revenue intended by the legislature to be embraced within the scope and meaning of section 88 of the Practice Act, nor is it a case wherein the State is interested as a party or otherwise. The State is merely a nominal party plaintiff, but is not interested in the case as a State. *People v. Gillespie*, 522

3. When an officer has received money, which, by the terms of the law prescribing his duties, he is required to dispose of in a specified mode, by a particular time, and fails to do so, to avoid liability he must account for its proper and legal disposition. *Id.*, 522

4. The cases embraced within the meaning of Sec. 88 of the Practice Act, are those only in which the question of the legality of an assessment or levy of a tax is directly in issue, or the liability of a person or persons, or of a corporation, to pay a tax levied, is denied, and such liability is the question submitted for adjudication. *Id.*, 522

5. The Appellate Court has jurisdiction of an action upon an official bond where the legality of a given tax, or whether money received is a tax, is brought up collaterally in defense, as in the case presented. *Id.*, 522

6. A county collector and his sureties can not be heard to say that a tax levy was not properly made, or the tax collected without proper authority. Such tax being collected by the collector, by virtue of his office, it is his duty to report and account for the same, and charge it to himself as treasurer, the county being under township organization. *Id.*, 522

QUO WARRANTO—See **STREET RAILWAYS**, 9, 10.

RAILROADS—See **CARRIERS**; **HIGHWAYS**, 1, 2; **PERSONAL INJURIES**.

1. In an action brought to recover from a railroad company for the death of person alleged to have been occasioned through its negligence, this court holds that although the third count of the declaration filed, charging that the train in question was run at a "great and unlawful state of speed," in contravention of a municipal ordinance, was subject to demurrer, that it was nevertheless sufficient to show that the plaintiff relied as a ground of recovery upon an ordinance, and the running of the train at greater speed than allowed thereby, whereby such death was occasioned; the fact being that the section of the ordinance was set out in full in the count, and issue having been taken on the charges made as a basis of liability, plaintiff had a right to prove them. *A., T. & S. F. R. R. Co. v. Feehan*, 66

2. It is proper in such case to exclude the testimony of a witness at the coroner's inquest, he testifying differently upon trial, and admitting and explaining his action, no statement claimed to have

RAILROADS. *Continued.*

been made at such inquest, and not admitted by him, being in conflict with his testimony as given on the trial. *Id.*, 66

3. The issues in the case presented, involving the question of care on the part of the deceased, evidence of the location of an elevator, box car, stock yards, coal shed and corn crib, on the railroad grounds, affecting the view of the train approaching the crossing, was admissible upon that issue as descriptive of the place where the accident occurred, to enable the jury to determine whether he did, or could, see the approaching train. *Id.*, 66

4. The fact being established in the case presented that the defendant at the time of the accident was violating the ordinance by running at an excessive speed, the presumption was that the killing arose through such negligence, there being nothing to show that the accident would have happened in case the train had been run in obedience to the ordinance or that it was due to some other cause than the negligence of defendant in that regard. *Id.*, 66

5. In case of a wrongful failure and refusal to stop a railroad train, a party injured thereby may recover all such damage as he might suffer by reason of that act. *C., R. I. & P. Ry. Co., v. Koehler*, 147

6. Acts touching the assisting of passengers upon and from trains are not within the apparent scope of the powers of a station agent. Their duties do not authorize any inference upon the part of the public that they are authorized to give directions to passengers in getting on or off cars. *Id.*, 147

7. Persons are presumed to have knowledge of the law prohibiting the boarding of trains while in motion. *Id.*, 147

8. A person can not recover for any injury occasioned by negligence merely, which would have been avoided by the exercise of ordinary care on his part. *Id.*, 147

9. While a plaintiff, who is in the exercise of ordinary care, may be guilty of slight negligence. a want of ordinary care on his part would constitute such negligence as would preclude a recovery. *Id.*, 147

10. In an action brought to recover for personal injuries alleged to have been occasioned through obeying the instruction of a station agent directing plaintiff to board a moving freight train, this court holds that such direction was not within the real or apparent scope of the authority of such agent, and that the judgment for the plaintiff can not stand. *Id.*, 147

11. The obligation resting upon railroad corporations to construct farm crossings, when and where the same may become necessary for the use of proprietors of adjoining lands, is purely statutory; where a new right is given by statute and the relief for its violation specified, the remedy must be enforced in the mode pointed out by the statute. *C., M. & N. R. R. Co. v. Eichmann*, 156

12. A lessor railroad company is not liable for trespasses committed by the servants—over whom it has no control—of the lessee company,

RAILROADS. *Continued.*

committed in connection with repairing the right of way; nor for damages arising from culverts getting out of repair after the road was turned over to the lessee company. *Id.*, 156

13. In an action brought to recover from a lessor, a railroad company, for damage to farm lands alleged to have been occasioned through insufficiency of culverts in its right of way, this court holds, in view of the evidence, and the fact that the damages allowed for the plaintiff were grossly excessive, that the judgment in his favor can not stand; and further, that the true rule of damages in this case was compensation for the loss of the crop for 1890, the rental value of the land until restored to fertility, and the labor and expense necessary to restore it. Evidence as to condition and behavior of culverts, since date of lease, is admissible in such case. *Id.*, 156

14. In the absence of any agreement a railroad company is not bound to furnish any better side tracks than such as are in general use, and it is proper in personal injury cases, where injuries are alleged to have occurred through defective side tracks, to admit evidence going to show that the tracks in question were constructed and kept in the usual and customary manner. *A. T. & S. F. R. R. Co. v. Alsdurf*, 200

15. Railroad brakemen must be held to understand the ordinary hazards attending their employment and to voluntarily take upon themselves those hazards when they enter upon their duties. *Id.*, 200

16. To build a depot platform in such manner between tracks as to compel a passenger to stand dangerously near a train is negligence, for which a company is liable in case of injury; but where such platform is of sufficient width to afford plenty of room for safety, it is not negligence to so build it that the nearest edge to the track could not be occupied in safety as a standing place while a train is passing. *C., B. & Q. R. R. Co. v. Mahara*, 208

17. Ordinary prudence requires that a person standing on such platform, waiting for a train, should give reasonable attention to his surroundings. He can not recover where he becomes so abstracted in thought as to be oblivious to his surroundings and is thereby injured. *Id.*, 208

18. Testimony of the plaintiff in an action brought to recover for damage arising from the flooding of lands through the negligence of another, setting forth that a certain flood occurred in 1887 or 1888, is admissible under an allegation that it occurred in 1887. *St. L., A. & T. H. R. R. Co. v. Winkelmann*, 276

19. In the construction of bridges and trestles crossing natural streams, and the approaches thereto, railroad companies must so construct them that they will not obstruct the natural flow of water. *Id.*, 276

20. Whether the trestle in a given case constituted an obstruction to the natural flow of the water by reason of which the flooding

RAILROADS. *Continued.*

occurred, or whether the flowage increased by reason of the manner of construction of the trestle, are questions of fact in a given case for the jury to determine. *Id.*, 276

21. In proceedings involving the condemnation of private property for railroad purposes, the profile of the proposed road is an important element in determining the damages, and is, when in evidence, the controlling evidence as to the plan of construction of the road, and if this be changed so as to inflict greater injury on the land owner, he can recover for the increased damages. *C. P. & St. L. R. R. Co. v. Brinkman*, 287

22. If a road is constructed in accordance with the profile offered in evidence on condemnation proceedings, and no change is made in the plans and profile so offered, no recovery can be had in an action on the case, by reason of a mistake of the jury in determining the amount of damage, or by reason of a failure to allow a sufficient sum as damages to contiguous lands, or a compensation for lands taken, nor by a wrong description of the profile, where it is open alike to be described by witnesses offered by the railroad company, or by the land owner, and all damages consequent on the construction of the road, in accordance with the implied agreement made by the company that it would be constructed according to the profile, when it is so constructed, are, by the condemnation proceedings, *res adjudicata*. *Id.*, 287

23. Damages arising from the piling up of earth excavated from road bed and ditches, is an element that may ordinarily be taken into consideration by the jury in determining the damages in condemnation proceedings. *Id.*, 287

24. Where a profile was in evidence and the road was constructed in accordance with it, the verdict of the jury can not be disturbed, although an engineer of the company had stated falsely to the jury when viewing the premises, or upon the stand, that the grade of the road would be different from what it turned out to be. *Id.*, 287

25. In a personal injury case, it is error to admit in evidence the testimony of persons who placed an inanimate object upon a railroad track, as to the distance at which it could be seen and its character distinguished, the circumstances and surroundings being entirely different from those that existed at the time of a given accident. *C. & A. R. R. Co. v. Logue*, 292

26. An instruction setting forth that an omission to ring the bell or sound the whistle in a given case was negligence, should not be given unless it appears that such omission was in some measure the cause of the injury. *Id.*, 292

27. An infant brother or sister of an infant killed through the alleged negligence of a railroad company, born a short time after the accident, is heir in an action brought to recover therefor. *Id.*, 292

28. It can not be considered to be contributory negligence for a passenger on a railway train to take hold of the brake wheel of a car, as he comes upon the platform thereof. *C. C. C. & St. L. Ry. Co. v. McHenry*, 301

RAILROADS. *Continued.*

29. If such brake is dangerous to persons leaving or entering a given car, recovery may be had for injuries suffered through the use thereof. *Id.*, 801

30. While a railroad company is not required to carry passengers on its freight trains, it may do so; and when it is in the habit of carrying passengers on a train starting at a particular time, it impliedly invites passengers thereon, and where a caboose is left on a side track shortly before a given freight train is to leave, and is left open at a point where passengers have been in the habit of boarding it, the company impliedly invites passengers to enter the same. *I. C. R. R. Co. v. Axley*, 807

31. If such company accepts passengers on a freight train it is held to the same degree of care as on a passenger train, except that the passenger must assume the usual ordinary risks arising from and incident to that method of travel, and when a passenger on such train is injured by reason of the negligence of the company, and at the time he is using due care and caution, he may recover. *Id.*, 807

32. The injury in question having occurred while the train in question was being made up, and before the conductor had proceeded to collect fares, this court holds that there is nothing in the contention that the plaintiff was guilty of fraud in failing to disclose her age, no questions having been asked touching the same. *Id.*, 807

33. A railroad company is not bound to fence its tracks at points within the switch limits of stations where freight is received and discharged. No recovery can be had for the death of the cow in the case presented, it having occurred at such place. *C. C. C. & St. L. Ry. Co. v. Röper*, 820

34. In an action brought to recover for damages alleged to have been occasioned by fire, set by sparks from a locomotive, where it is shown that such sparks set the fire, a *prima facie* case is established for the plaintiff, and the burden is cast upon the defendant to rebut the liability. *St. L., A. & T. H. R. R. Co. v. Strotz*, 342

35. This court declines, in view of the evidence, to interfere with the judgment for the plaintiff in the case presented, wherein it was sought to recover for damages caused by such a fire. *Id.*, 342

36. Every statute imposing a duty upon one person for the benefit of another, implies the existence both of a liability and a remedy, though none is specifically provided, where an injury results from the failure to perform such duty. *O. & M. Ry. Co. v. McGehee*, 348

37. Where, after a farm crossing has been put in, it is removed, and not replaced, by the company, so that a landed proprietor can not cross the railroad track at any place reasonably convenient to his property, an action at common law, based upon the statutory duty of the company, will lie for damages sustained thereby, and the burden is on the plaintiff, in such case, to show what amount of damages was caused by such act. *Id.*, 848

RAILROADS. *Continued.*

38. In case of the removal of such crossing, crops in fields usually approached thereby, should be cared for and harvested, and the damages should be limited to the additional expense occasioned by such removal. *Id.*, 348

39. If servants of a railroad company knew that a passenger on one of its trains was in a state of unconsciousness, through intoxication, and knew that while in that condition he was sitting on the rear steps of the last car of said train while the same was in motion, and permitted him to remain there, whereby he fell off and was killed, the company is liable in damages. *St. L., A. & T. H. R. R. Co. v. Carr*, 353

40. The law does not, however, as a rule, impose the duty on railroad companies to protect their passengers, while on their trains, from the passenger's own negligence. Their duty is to furnish a safe and convenient mode of transportation, of which the passenger is to avail himself, and then safely, in that mode, to transport him. They do not have to watch the doors or windows to prevent passengers from jumping or falling off their trains. *Id.*, 353

41. If a passenger voluntarily becomes intoxicated, the law does not impose the duty on the common carrier to place a guard over such passenger to prevent him from injuring himself, or placing himself in a place of danger. *Id.*, 353

42. In the case presented, this court holds that no evidence was introduced to show negligence on the part of any agent of the company, which would create a liability or uphold the judgment in plaintiff's favor. *Id.*, 353

43. In an action brought to recover for the death of a person at a railroad crossing, it being alleged that the same was caused by the defective condition thereof, this court holds, in view of the evidence, that the same was occasioned by her own negligence, and that the judgment against the company must be reversed. *C. C. C. & St. I. Ry. Co. v. Arbaugh*, 360

44. In actions brought to recover from a railroad company for injury to growing crops through flooding, the court holds as erroneous the rejection of certain expert evidence offered by the defendant, and that the judgments against it can not stand. *O. & M. R. R. v. Schmidt*, 383

45. Par. 68, Chap. 114, Starr & C. Ill. Stats., touching signals, is applicable only to cases where persons are approaching and about to pass over a highway crossing, and not to persons upon roadways parallel with the railroad line, not intending to cross the same. *L. E. & St. L. Con. R. R. Co. v. Lee*, 384

46. The words "terminal facilities," as understood by those operating railroads, do not include tracks other than those used in making up trains. *I. L. & S. V. L. Ry. Co. v. L. & N. R. R. Co.*, 414

47. In the case presented, this court holds that a track named, was not a part of plaintiff's terminal facilities, and that switching cars over it to and from certain car shops, was a service separate and

RAILROADS. *Continued.*

distinct from those services mentioned or included in the contract sued on, and that the plaintiff is entitled to recover the amount such separate service was reasonably worth. *Id.*, 414

48. This court likewise holds that the evidence in the case presented warranted the jury in finding that defendant road was the successor of the original lessee, and operated its trains over plaintiff's track, had the benefit of plaintiff's franchise, and the use of its depots and terminal facilities, and was furnished by plaintiff with labor, materials and supplies, in the same manner its predecessor had been supplied, and that plaintiff was entitled to recover therefor; and further, that under the common counts the plaintiff was not bound to prove a special contract, in order to recover a reasonable price for the use and occupation of its property. *Id.*, 414

49. This court likewise holds, that if plaintiff and defendant recognized, and acted under the contract in question as a valid and binding contract between them, during the time defendant used and occupied plaintiff's property, no formal assignment of the same was necessary to a recovery under it by the plaintiff for a breach of its conditions. *Id.*, 414

50. Par. 5, Sec. 20, Chap. 114, R. S., applies to roads constructed after that act went into effect. *Wabash Railroad Co. v. Sanders*, 436

51. It can not be held that damaging of lands by overflowing them is a "taking" within the meaning of the Constitution and therefore one owning the lands may not have such damages assessed as for a "taking" as against any one owning the road. *Id.*, 436

52. Under the rule that the pleading is to be taken against the pleader it can not be assumed, in the case presented, that the defendant created the nuisance by the construction of the railroad, or was required to abate it, the declaration averring a nuisance consisting of the maintenance of an insufficient culvert across an arm of a stream, whereby, during a freshet, coal slack was deposited on plaintiff's land, there being no averment as to when or by what railroad company the culvert and embankment were constructed, or that appellant was notified to abate the same, said slack having been washed from the embankment. *Id.*, 436

53. A railroad company is not bound to pay the bill of a physician attending an injured employe at the instance of another employe, unless the latter was authorized to engage the physician, or such act was subsequently ratified by the company. *St. L., M. B. T. Ry. Co. v. Wiggins*, 474

54. Whether or not a person bringing suit against a railroad company to recover for personal injury alleged to have been caused through its negligence, was injured by reason of an apoplectic attack brought on through his own imprudence, is a question of fact for the jury in a given case. *O. & M. Ry. Co. v. Allender*, 484

55. If a passenger is injured through boarding a moving train, a sufficient stop having been made for him to have boarded it in

RAILROADS. *Continued.*

safety, such act constitutes contributory negligence and bars a recovery. Proof that others had frequently boarded trains with knowledge of servants of the company operating the train after the fact without proof of encouragement so to do, would not prove custom or license. *Id.*, 484

56. A person voluntarily boarding a train by mounting the front platform of the express car therein, with the knowledge that such car is in the exclusive control of the express company, can not place the railroad company in the position of being legally required to do an act which he knew it had no legal right to do, viz., see that the front door of such car was unlocked, so that plaintiff could pass through such car in order to reach a passenger coach in its rear, and this would not be the law, even if the contractual and legal relation of passenger existed at the time. *Id.*, 484

57. Such contract is subject to modification and change by the agreement or acts of the parties. It implies that a passenger will present himself in the usual and ordinary way, as known to him and provided by the company, to take passage on its train, and thus obtain the full accommodation and safety to his person that was secured by the contract. *Id.*, 484

58. A person voluntarily going upon the front platform of the express car in a given train, takes upon himself the hazards of his voluntary act, which imposes upon him the exercise of a degree of care commensurate with the risk voluntarily assumed in the ordinary and usual running of the train, he knowing such car to be in the exclusive control of the express messenger. *Id.*, 484

59. An engineer ordinarily has no right by his invitation to a person to board his train, to create the relation of passengership. *Id.*, 484

60. In an action brought to recover from a railroad company, for injury to fruit trees, bushes and vines by fire communicated by sparks from a locomotive engine, it is proper to prove on trial the damage to the real estate by such fire, by showing the difference in value before and after the same. *L. E. & St. L. R. R. Co. v. Spencer*, 503

61. To satisfy the requirements of the law with respect to spark arresters and similar appliances, they must not only be of the most approved kind, but must be kept in suitable and good repair to effect the purpose for which they are designed and used. *Id.*, 503

62. A railroad company owes no statutory duty to a trespasser upon its track. If injured there can be no recovery, unless the injury was willfully or wantonly inflicted, or the negligence was so reckless or negligent in its character as in law to amount to wantonness. *Eggman v. St. L., A. & T. H. R. R. Co.*, 507

63. The fact that the portion of a track where a person was injured was habitually used by pedestrians, does not change the relative rights or obligations of one injured while on the track, or those of the company; such person will still be a trespasser. *Id.*, 507

RAILROADS. *Continued.*

64. A failure to comply with Sec. 90, Chap. 114, R. S., touching the rear brakeman of a train remaining in his place, is negligence, for which a liability would arise for an injury resulting therefrom to a person in the exercise of ordinary care, but is no evidence of a reckless disregard of human life. It would not amount to wantonness. *Id.*, 507

65. A railroad company does not owe any statutory duty as to signals to a person on its track within eighty rods of a highway crossing. *Id.*, 507

66. The protection and shield of the law extends to those ignorant of its provisions as much as to those most learned in it. *L. N. A. & C. Ry. Co. v. Red*, 662

67. What constitutes due care, ordinary care, diligence or negligence depends very largely upon the circumstances of each particular case. *Id.*, 662

68. Railroad companies may be presumed to know the condition of the crossings over which they run their trains, and if they see fit to operate them in cities at places where statutory obligation to have the public right of way safe, has been neglected, they must at least be held bound to exercise such diligence as the safety of persons at the unsafe public way demands. *Id.*, 662

69. In an action against a railroad to recover for the death of a person named, this court holds that the evidence justified the finding that but for the negligent failure of such company to keep the crossing where the accident occurred, safe as required by the statute, such accident would not have occurred, and that deceased was killed by a train operated by a certain road. *Id.*, 662

REAL PROPERTY—See APPELLATE COURT—JURISDICTION OF; FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT; MECHANICS' LIENS; MORTGAGES; MUNICIPAL CORPORATIONS, 12, 13, 14; RAILROADS, 13, 20, 21, 22, 23, 24, 44, 51; SALES, 6, 7, 8; TRUST DEEDS; WAY.

1. This court affirms the judgment for the plaintiff, in an action brought under an alleged contract for the sale of real estate, the evidence being conflicting, and no question of law being involved. *Lyman v. Otley*, 82

2. A parol reservation of a crop can not stand, in view of the conveyance by warranty deed of the land in question, the same containing no reference to such reservation. *Carter v. Wingard*, 296

3. A license by parol, may be given to remove a crop from land owned by the licensor, and the severing thereof from the soil before the revocation of the license by the licensor estops the latter from so revoking. *Id.*, 296

4. While one tenant in common may bring trover to recover the value of his interest in a crop converted by his co-tenant, when such action is brought, it is recognition of the relation that exists between them. *Id.*, 296

5. The action in the case presented, being brought to recover a certain share of a given crop, the plaintiff, by asserting a tenancy,

REAL PROPERTY. *Continued.*

recognized the existence of the relation between himself and the defendant, and the latter having delivered the share to which the former was entitled, the judgment against the former can not be disturbed. *Id.*, 296

6. The owner of land, or one holding it under a lease, may plat the same for purposes of subdivision and subletting, or sale of the interest of one so holding the same, and when done by a lessee, such platting can, in no manner, affect the title or create a dedication of any part thereof to the public, and where so platted by the lessee for purposes of description, one taking a lease under such lessee may acquire any title that he could convey, and the description by plat is a sufficient description. *Sexton v. Carley*, 316

7. An outstanding title to defeat a clear, connected title in another, must be superior thereto, giving the holder of the former the right of immediate entry. *Id.*, 316

8. In an action of ejectment brought to recover possession of a leasehold interest in certain lots, the same being a portion of what are known as Cahokia Commons, this court holds, in view of the evidence, that a lease involved could not be considered forfeited, no demand for rent having been made, and that the judgment for the plaintiff must be affirmed. *Id.*, 316

9. In view of the evidence, this court declines, in the case presented, to interfere with the decree for the complainant, granting a vendor's lien on certain real estate for certain unpaid purchase money. *Koch v. Roth*, 458

10. In an action brought to recover for injury done real property, through building a railroad embankment in front thereof, this court holds that there is nothing in the contention that plaintiff is bound to prove title in fee simple, under the averment that she was the owner and possessor of the lot; and that it would be enough if she proved she was in possession thereof, and was injured in her peaceable possession, and thus damaged by a wrong-doer, and all these facts were proven by evidence not excepted to, and that at least after verdict, a recovery would be sustained. In tort a plaintiff may prove a part of his charge and recover. *McCormick Harvesting Machine Co. v. Adele*, 542

REMITTITUR.

1. The entry of a remittitur is proper. *Locke v. Duncan*, 110

REPLEVIN.

1. Upon a suit in replevin brought for a certain stock of goods, plaintiff contending that defendant held the same under an arrangement amounting to a mortgage, defendant maintaining that the transaction was an absolute sale, this court holds, there being no evidence of a tender to defendant of the amount due him, that the judgment for the defendant can not be disturbed. *Edwin v. Jacobson*, 93

2. To enforce such contract, if shown, the remedy would be in equity. *Id.*, 93

REPLEVIN. *Continued.*

3. In an action of replevin brought to recover a piano, the defendant alleging it to be a gift, and the plaintiff contending that there had been no delivery thereof, this court holds that the direction given by the latter to the former to take the same from his house, followed by a removal, amounted to a sufficient delivery.

Phenix v. Gillfillan, 220

4. If a replevin bond as given, gives a right of action, although it does not contain all the provisions required by a certain statute, the signers thereof can not, when sued upon it, interpose the defense that it does not provide for another cause of action. It can not be said to be void if good at common law. *Hotz v. Bollman Bros. & Co.*, 378

5. The omission in the bond is as to the payment of costs and damages for wrongfully suing out the replevin writ; such condition is separate and distinct from the condition embodied in the bond sued on. An action will lie for a breach of either, as each condition is an independent obligation, and a failure to keep either is a ground of action. *Id.*, 379

6. The affidavit, writ and bond in a replevin suit are a part of the same proceeding, and for the purpose of determining the identity of the bond, the date of suing out the writ and the court out of which it was sued, may be considered together—not for the purpose of supplying essential omissions in the bond, but to correct unessential recitals made for the sole purpose of identification of the bond with the suit. *Id.*, 379

7. In an action brought upon a replevin bond, the same being inaccurate in certain particulars, the declaration pretending to explain such inaccuracies, a general and special demurrer being sustained thereto, this court holds said action to have been erroneous and reverses the judgment for the defendant. *Id.*, 379

RIPARIAN RIGHTS—See FORCIBLE ENTRY AND DETAINER, 1, 2, 3, 4.

SALES—See CONTRACTS; FRAUD; FRAUDULENT SALES AND CONVEYANCES, 1; MORTGAGES, 3, 4; REPLEVIN, 1, 2.

1. Whether a given debt was an honest one, and a sale made to the creditor of a stock of goods was made in good faith, are questions of fact for the jury in a given case. *Locke v. Duncan*, 110

2. A creditor acting in good faith may take all the goods of his debtor in satisfaction of his debt, although he knows by so doing he leaves his debtor with no means to satisfy the debts of the creditors. *Id.*, 110

3. Where, in an action of trespass against creditors of the debtor attaching after the sale, such sale being alleged to be fraudulent, and throughout the whole course of the litigation in the court below no other defense is alleged, no attention will be paid to the point first raised herein, that the defendants were not shown by the evidence to have had any connection with the trespass. *Id.*, 110

4. Contracts of sale whereby the seller undertakes to secretly retain title in himself, but to give an appearance of ownership in

SALES. *Continued.*

the purchaser, are void as to third parties. *Fifield v. Farmers Nat. Bank,* 118

5. Where such seller allows the property sold to be attached to the freehold in a given case, and used in a building as part of the plant, and under a deed running to the purchaser, which required the same not to be removed within a certain number of years, the seller, in equity, should be held as having waived the secret lien and consented to the machinery being used as a part of the manufacturing plant. *Id.,* 118

6. The commission on sales made by real estate brokers is the basis of the value of their business, and the commission is on the value of land, and not on the number of tracts on his list, and the expression of an opinion by such broker to a person contemplating the purchase of an interest in his business, as to the amount of profits to be made in such business, can not be accepted as a representation of a fact, but must be looked upon as simply an opinion, and not the basis of a right to rescind such contract duly entered into. *Musick v. Gatzmeyer,* 329

7. The representations of the seller, that the number of properties on his books has more than doubled within a given time, if untrue, to be deemed fraudulent to the extent that it may be made ground for rescinding the contract, the person to whom they were made must have relied upon them, and have been deceived thereby, and it must further be shown that the statements were relied upon to the extent that but for them, the contract would not have been made, and this reliance on such statements is a matter to be proven by the plaintiff, and may be disproven by the defendant. *Id.,* 329

8. It is proper to ask the plaintiff in such case, upon cross-examination, the interest sold being in a real estate and insurance business, whether he would have bought, had nothing been said as to the amount of property on the books for sale, or of insurance business being done. *Id.,* 329

9. The right of return of goods sold and warranted, exists where the contract is unexecuted, or there is a stipulation that the property may be returned if not found to be satisfactory, or the warranty was accompanied with fraud in the sale. *Mayes v. Rogers, Schwartz & Co.,* 372

10. If property purchased is accepted by the vendee, then, in the absence of fraud, it can not be returned. In such cases the contract of warranty exists during the life of the statute of limitations, and the remedy for a breach is upon it alone, and not upon the contract of sale. *Id.,* 372

11. The right to return property purchased with a warranty before acceptance, does not depend upon the contract of warranty, or the rescission of the contract in the absence of fraud, upon the fact that the property is not of the kind or quality contracted for. Such being the case, the purchaser may return the property, if done within a reasonable time, but in so doing he does not rescind the contract. *Id.,* 372

SALES. *Continued.*

12. The vendee may, notwithstanding such return, insist on the vendor complying with it, and on failure to do so may recover damages, or he may refuse to receive or accept other property after such return on the ground of the failure of the vendor to comply with his contract, if the contract itself does not reserve to the vendor such right of furnishing other property under the contract, and in compliance therewith. Until the vendor delivers the kind of property purchased, or the property delivered is accepted by the vendee, the contract of purchase remains executory, and the contract of warranty remains in abeyance; for, primarily, the warranty only becomes vitalized so that an action may be maintained upon it when the contract of sale becomes executed by an acceptance of the property, express or implied. *Id.*, 372

13. Receipt does not always amount to acceptance; it becomes so if the right of rejection is not exercised within a reasonable time. *Id.*, 372

14. This court holds as proper a refusal to allow defendants to show that they had tendered back the evaporators in question, in rescission of the contract involved, before the present suit was instituted, no fraud being claimed, in view of the averments of the declaration that one of the appellants had, before suit, purchased the interest of the other. *Id.*, 372

SCHOOLS.

1. In an action brought by a teacher to recover a balance claimed to be due him on account of salary, a wrongful discharge being alleged by him, this court holds, in view of the evidence, that at the time of the consummation of the contract in question, the plaintiff had no certificate of qualification to teach for the term of the contract of service; that said contract was illegal, and that the judgment in his favor must be reversed. *School Directors v. Newman*, 364

SEPARATE MAINTENANCE.

1. In view of the evidence in the case presented, wherein a wife filed a bill for separate maintenance, and her husband filed a cross-bill for divorce, this court declines to interfere with a decree dismissing both bills. *Howard v. Howard*, 453

SET-OFF—See CONTRACTS, 16.

SPECIAL FINDINGS.

1. Where a party desires special findings, his questions must be so framed as to submit to the jury material and controlling facts. *Hanewacker v. Ferman*, 17

2. Only special findings inconsistent with the general verdict are of consequence. *C., C., C. & St. L. Ry. Co. v. McHenry*, 801

SPECIAL INTERROGATORIES.

1. This court holds as proper the refusal of the trial court to require the jury to answer certain interrogatories, the fact being that neither of the propositions submitted, on which the jury were asked

SPECIAL INTERROGATORIES. *Continued.*

to find specially, if answered in the affirmative, could control the general verdict. *St. L., A. & T. H. R. R. Co. v. Winkelmann*, 276

STATUTES—See RAILROADS, 11, 36, 37, 38.

1. One of the rules of interpretation of a new statute is to consider the evils intended to be remedied by its enactment and the remedy sought, and to construe it in such light. *Bowles v. Keator*,

98

STATUTE OF FRAUDS.

1. To be valid, a promise by one to pay the debt of another, must be in writing. *Tanquary v. Walker*,

451

2. In an action to recover for labor and material in connection with the erection of certain houses, the fact being that the contractor built them upon land of a third person to whom he subsequently turned them over, the latter agreeing to pay the indebtedness outstanding against them, this court holds that such agreement was in the nature of an original undertaking; was not required to be in writing, and was not, therefore, void under the provisions of the statute of frauds. *McCasland v. Doorley*,

513

STATUTORY BONDS.

1. Statutory bonds taken by court officers will be liberally construed. Courts will look to the meaning of the parties as collected from the instrument itself, and when the meaning is evident, will reject or transpose insensible words and supply accidental omissions in the way of mere recital. *Hotz v. Bollman Bros. & Co.*,

378

STOCK, INJURY TO—See RAILROADS, 33.

STREET RAILWAYS.

1. In the absence of constitutional limitations, the legislature of a given State has the power to authorize, at pleasure, the use of streets for railroad purposes. *Citizens Horse Railway Co. v. City of Belleville*,

388

2. In view of statutes named, this court holds that the city in question had the legal right and authority to impose such terms and conditions upon the street railway company referred to as it deemed best for the interest of the public, and that although a given court had the power to determine whether such terms and conditions and the mode of their enforcement contravene established principles of law subject to which rule the exercise of all subordinate authority exists, beyond that, the court could not go. *Id.*,

388

3. The words "due process of law" as set forth in the principle providing that no person shall otherwise be deprived of his property, have reference to judicial proceedings according to the course and usage of the common law. *Id.*,

388

4. The right and privilege to construct and operate a horse railroad in the streets of a city for the purpose of carrying passengers for hire, is property, if such road is constructed and completed in accordance with the terms imposed. *Id.*,

388

5. The power exists in a municipality to impose terms upon such corporation as to the time and character of the road to be con-

STREET RAILWAYS. *Continued.*

structed, upon the fulfillment of which depend the maturing of the grant, and while such conditions are being fulfilled within the time prescribed, if there is a limit, the grant remains inchoate, and they are termed conditions precedent; while those terms imposed, that affect the manner of operating the road and its state of repair after its proper construction, are conditions subsequent; in which case such a grant becomes vested property with all the rights attached that secure tangible property. In the case presented, the conditions imposed which it is claimed have been violated, were conditions subsequent, and the grant had vested as property, and could only be divested by due process of law. *Id.*, 388

6. While an ordinance, when accepted by a street railway company, becomes a contract, subject to revocation at the will of the city—such right being reserved—while the contract remains executory, after such time, even if the ordinance is considered merely as a contract, it then becomes an executed contract ripened into a perfected grant—vested property—notwithstanding the terms imposed therein, upon which, as vested property, the subsequent conditions continue to operate under the law as applicable to such conditions, and it is not left to one of the parties to the original contract to enter judgment of forfeiture of the property of the other party to the contract and thereby divest him of his rights. It is a question of fact whether the cause of forfeiture exists; and the determination of that question would be for the courts and not the city to decide. There would have to be a legal investigation where both parties could be heard, and a judicial determination upon the facts so developed, such being “due process of law.” *Id.*, 388

7. The effect of the forfeiture claimed in the case presented, is to render the charter of defendant corporation, and its franchise, inoperative—tantamount to an ouster from the franchise, viz., the right to “operate a horse railway in the streets of the city named,” the rights and privileges granted by said city being a vital part of the franchise. *Id.*, 388

8. A municipality does not stand in the same relation to such a charter and franchise merely because it has control of the streets, that an individual does who owns lands within the line of the right of way of an ordinarily incorporated railroad company. In the latter case the charter is complete when granted by the State and carries with it, under the law of eminent domain, the power to execute, with or without consent of such owner of land, the franchise. In the former case the municipality is related to the State as its agent, invested with constitutional rights as well as delegated power, in regard to the right to operate in the streets, horse railways, without whose action, and by incorporating its consent in the charter granted by the State, the franchise is a nullity. *Id.*, 388

9. Since the Constitution of 1870, the right to create and perfect such a franchise as is involved in the case presented, rests both in the State and the municipality, and the consent of the latter when

STREET RAILWAYS. *Continued.*

granted is a part of the franchise, and the fact that the ordinance, when accepted by the company, created a contract between the parties does not affect this view. The charter of defendant is in a sense just as much a contract with the State as is the ordinance with the municipality. The contract feature, however, is limited to those provisions of the charter or ordinance relating to the dealings between the incorporated company, and the State or municipality as such, and does not extend to those provisions relating to the dealing of such incorporated company with the public. *Id.*, 388

10. The franchise of the defendant company being sought to be involved in the proceeding herein, the attempt to enforce a forfeiture should have been in a direct proceeding by *quo warranto* under Chap. 112, Ill. Stats. *Id.*, 388

11. This court holds, that a certain paper filed by complainant, called a petition, the same being in the nature of an affidavit, in support of a motion to the court in charge through its receiver in foreclosure proceedings, to release from its control and custody, the property of the defendant, in order that the former might remove the tracks, etc., of the defendant, from its streets, should in view of its contents be stricken from the files of the case presented. *Id.*, 388

TAXATION—See MUNICIPAL CORPORATIONS, 25, 26, 27; PRINCIPAL AND SURETY, 6.

TRESPASS—See CONTRACTS, 8; RAILROADS, 12; SALES, 3; WAY, 6.

1. A writ of attachment having been sued out, and levied upon certain goods purchased by plaintiff from a debtor of defendant, such sale being alleged to have been fraudulent as to the creditors of the seller, this court holds, the fact being that at the time of the levy the sheriff also levied another writ of attachment on the same goods, indorsing on the back of each writ the same list of goods, that defendant herein can not evade responsibility by showing that others participated in the trespass by suing out and having levied upon the goods, other writs, and that it is liable in the full amount of the judgment rendered. *French & Potter Co. v. Duncan*, 113

2. A person having the legal remedy in his hands to enforce a given right, has no authority to take the remedy into his own hands and compel compliance by destroying, or threatening to destroy, the property of another. *Dexter v. Heaghey*, 205

3. In the case presented, this court declines to interfere with the judgment for the plaintiff, the questions involved being entirely of fact, the action having been brought to recover for damages done growing crops, by cattle. *Saltenberger v. Lang*, 286

TROVER—See REAL PROPERTY, 4, 5.

1. In an action of trover for the alleged wrongful conversion of certain personal property, the fact being that plaintiffs were the holders of a promissory note given by a person, since deceased, who had also, to secure the same, given a bill of sale of certain property, the contention being that the property demanded was not included

TROVER. Continued.

therein, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *McGraw v. Patterson*, 87

2. A list of the goods demanded, with price opposite each item, the same being used by the officer who made a demand therefor, should not be allowed to go to the jury, even with the caution not to regard such prices, there being a likelihood that they will be influenced thereby, notwithstanding such caution. *Id.*, 87

3. This court holds that a recovery was properly had for goods held to be sold upon commission. *Id.*, 87

TRUSTS—See ADMINISTRATION; CORPORATIONS, 1.

TRUST DEEDS—See ADMINISTRATION, 7; BUILDING AND LOAN ASSOCIATIONS, 1, 2.

VARIANCE.

1. A declaration describing a judgment against one, is not supported by the production of a judgment against that one and another, or others. A material variance exists in such case. *Schertz v. First Nat. Bank*, 124

2. Where no objection is made to evidence offered on trial, nor variance argued in the motion for new trial or assignment of error, the declaration must be held to be sufficient after verdict. *C. C. C. & St. L. Ry. Co. v. McHenry*, 301

3. The question of variance between the evidence and the declaration in a given case can not be raised where no objection and exception was interposed to any evidence introduced. *McCormick Harvesting Machine Co. v. Adele*, 542

4. This court will not consider an alleged variance between the evidence and the declaration in a given case, the same not having been pointed out on trial. *Fish v. Seeberger*, 580

VERDICTS—See JUDGMENTS AND DECREES, 2; MORTGAGES, 5; RAILROADS, 24.

1. When, in a given case, the jury has found facts upon which their verdict must necessarily be based on insufficient evidence and contrary to common reason and justice, it is the duty of this court upon appeal to set aside such verdict. *City of Peoria v. Walker*, 182

2. This court condemns the conduct of jurors and certain attorneys in the case presented, they having adjourned to a neighboring saloon after the verdict had been sealed and before it had been opened and rendered, and there indulged in conversation, and "treats" at the expense of one of said attorneys. *McLaughlin v. Hinds*, 598

3. Such occurrence, to be used as an objection to the verdict, should be interposed before the same is opened and read. *Id.*, 598

WAIVER.

1. A specific objection based solely upon a particular fact is strictly a waiver of all objections based upon other facts not specified or relied upon. *Boyer v. Yates City*, 115

WAREHOUSEMEN—See CARRIERS, 1.

WARRANTY—See SALES.

WAY.

1. A tenant can not grant a valid easement over the land of the owner without authority from him. *Drda v. Schmidt*, 267

2. One asserting the act of dedication by a tenant must show his authority to so dedicate; failing in this, no interest passes in the realty as against the owner or any one purchasing under him. *Id.* 267

3. The use of a private way, without a claim of right to such use, is not of such adverse character as will form the basis of a prescriptive right. *Id.*, 267

4. The fact that others passed over the land in question at the *locus in quo* can not affect the question in a given case as to whether the defendant had an easement therein. *Id.*, 267

5. The question in such case as to the use of the land, and whether an easement had been acquired by dedication or by prescription, are for the jury. *Id.*, 267

6. In an action of trespass touching certain real estate, defendant claiming a right of way, this court holds that there was no error of which defendant could complain as to the apportionment of costs therein, and declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Id.*, 267

7. The maintaining of gates at the entrance of a way excludes the presumption of the dedication thereof to the public. *Schmiesuer v. Penn*, 278

8. In an action brought to foreclose a mortgage given to secure a note given as part consideration for the purchase of the lands in the mortgage described, the defendant contending—the deed conveying said lands being in the statutory form, and to be deemed as a covenant against incumbrances—that there was an incumbrance upon the property in the nature of a private way, this court holds, in view of the evidence, the existence of such way being shown, that the same is not included in the term highway as used in Sec. 10 of the Conveyance Act, and that said incumbrance constituted a breach of the implied covenant in the deed in question. *Id.*, 278

9. Such defense may be set up in answer to a bill to foreclose a mortgage given to secure the purchase price. *Id.*, 278

10. Where in such case the evidence shows the defendant to have been damaged by reason of the existence of such right of way, the extent thereof should be set off against the amount of the notes sued on. *Id.*, 278

WILLS—See JURISDICTION, 5.

WITNESSES—See MASTER AND SERVANT, 8.

1. Upon cross-examination of a witness to develop the fact of his interest in the suit, it was the interest of the witness as he then understood it that was proper to be considered by the jury, and the fact that he was mistaken, as was subsequently discovered, as to such interest, did not affect the propriety of the cross-examination.

Marschall v. Laughran,

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WRITS OF CERTIORARI—See APPEAL AND ERROR, 9.

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